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(25,262)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 465.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, STATE OF TEXAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 10, 1916.

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a *Caption.*

Be is Remembered, that at a term of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, begun and holden at the City of Austin, State of Texas, on the First Monday in October, A. D. 1913, and ending on the First Monday in July, A. D. 1914, the following, among other, proceedings were had, to-wit:

WEDNESDAY, June 3rd, 1914.

No. 5300.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Travis County.

Judgment affirmed.

b No. 28844.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

1 Caption.

THE STATE OF TEXAS,
County of Travis:

At a term of the District Court of the 53rd Judicial District of Texas, begun and holden at Austin, within and for the County of Travis, before the Honorable George Calhoun, Judge thereof presiding, and which adjourned on the 28th day of June, A. D. 1913, the following case came on for trial, to-wit:

No. 28844.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

2 *Plaintiff's Original Petition.*

Filed May 1st, 1912.

In the District Court of Travis County, Texas, 53rd Judicial District.

THE STATE OF TEXAS,
County of Travis:

To the Honorable Judge of said Court:

1.

The State of Texas, plaintiff, appearing herein by and through her Attorney General, Jewel P. Lightfoot, who brings this suit at the instance and request of, and under instructions from the Railroad Commission of Texas, complaining of Gulf, Colorado and Santa Fe Railway Company, defendant, respectfully represents that defendant is a railroad corporation duly incorporated under the laws of the State of Texas, and that F. G. Pettibone, who resides in Galveston County, Texas, is the Second Vice-president and General Manager of defendant company and upon whom service of process may be made.

2.

Plaintiff further alleges that on the 1st day of August, 1911, and continuously since said date the defendant owned, controlled and operated a line of railroad in this State extending from the City of Galveston, Texas, to Red River on the northern boundary of said State and passing into and through the county seat, cities and towns of Richmond, Bellville, Brenham, Caldwell, Cameron, Meridian, Cleburne, Fort Worth and Gainesville, all in the State of Texas, and during all of said times defendant had and maintained depots, stations and station buildings in each and all of said towns and defendant was engaged in the business of a common carrier of
3 freight and passenger for hire on and over said line of railroad aforesaid.

3.

Plaintiff further alleges that during all of said period of time hereinbefore alleged and now the City of Meridian was and is the county seat of Bosque County, Texas, and was and is incorporated under the general laws of the State of Texas as a city having one thousand inhabitants or over.

4.

Plaintiff further alleges that during all of said period of time aforesaid defendant operated and still operates on and over its said line of railroad, and passing into and through said City of Meridian aforesaid, two certain trains carrying passengers for hire, and known and designated as trains numbers seventeen (17) and eighteen (18), the former a south bound train passing said City of Meridian at about 11:30 o'clock P. M. each day and the latter being a north bound train, passing said city of Meridian, each day, at about 5 o'clock A. M., neither of which said trains stop- at Meridian for the purpose of receiving or letting off passengers thereat, but both pass into and through said City, each day, without stopping.

5.

Plaintiff further alleges that on about the 11th day of March, 1912, the Railroad Commission of Texas, acting within and under the power and authority conferred upon it by law, duly and legally made and entered the following order, rule and regulation, to-wit:

Hearing No. 1248.

"Office of Railroad Commission of Texas.

AUSTIN, TEXAS, March 11, 1912.

Meridian Petition to Stop Trains Nos. 17 and 18 on G., C. & S. A. Ry. Co.

The above numbered and entitled cause having been called
4 for hearing by the Railroad Commission of Texas, on the 13th day of February, 1912, and the parties (Petitioners and said Gulf, Colorado and Santa Fe Railway Company) appeared in pursuance of previous notice duly given by the Commission, and the Commission having heard the evidence offered and the facts presented pertaining to the matters covered by the petition and notice aforesaid, and having duly considered the same, the Commission finds that Meridian is the County Seat of Bosque County, Texas, and is a regular station on the line of railroad of the Gulf, Colorado and Santa Fe Railway Company; that said Railway Company now runs and operates three trains, carrying passengers, each way daily over its said line and passing said station at Meridian and that two only of said trains, each way daily, stop at said station for the purpose of receiving and letting off passengers, and that one of said trains, each way daily, to-wit, trains numbers 17 and 18, but do not stop at said station at Meridian for the purpose of receiving and letting off passengers thereat, and that the trains which do stop at said station as aforesaid are inadequate and insufficient to accommodate the needs of the business at said station and for the proper accommodation of the traveling public.

Therefore, by virtue of the authority conferred upon it by law, it is hereby ordered by the Railroad Commission of Texas, that from and after the 2nd day of April, 1912, the Gulf, Colorado and Santa Fe Railway Company be and it is hereby ordered and required to regularly and daily stop said trains numbers 17 and 18, at said station at Meridian, the County Seat of Bosque County, Texas, for a time sufficient to receive and let off passengers with safety at said station at Meridian.

It is further ordered that a copy of this order, be, by the Secretary, immediately forwarded to said Railway Company for its information and observance.

5 WILLIAM D. WILLIAMS,
JOHN L. WORTHAM,
Commissioners.

Attest:
E. R. McLEAN, *Secretary.*

6.

Plaintiff further alleges that said order of said Railroad Commission of Texas as aforesaid, was so made and entered after notice of a hearing on said subject had been duly and legally given and served on defendant and after defendant had appeared before and was heard by said Railroad Commission of Texas at said hearing and that said order was made under authority of law and said Railroad Commission of Texas was duly and legally authorized and empowered under the law to make said order; that under the terms and provisions of said order defendant was ordered and required from and after the 2nd day of April, 1912, to regularly and daily stop said trains numbers 17 and 18 at said station at Meridian, the county seat of Bosque County, Texas, for a time sufficient to receive and let off passengers thereat with safety.

7.

Plaintiff further alleges that at and upon said hearing aforesaid the Railroad Commission from the facts presented and the evidence offered found, and plaintiff here alleges the same to be true that said City of Meridian is the county seat of Bosque County, Texas, and is a regular station on the line of railroad of the defendant railway company, and that said defendant runs and operates three trains and no more, carrying passengers each way daily over its said line of railroad and passing said station at Meridian, and that two only of said trains each way daily stop at said station for the purpose of receiving and letting off passengers, and that one of said

6 trains each way daily, to-wit, trains numbers 17 and 18 pass but do not stop at said station at Meridian for the purpose of receiving and letting off passengers thereat, and that the trains which do stop at said station aforesaid are inadequate and insufficient to accommodate the needs of the business at said station and for the proper accommodation of the traveling public.

8.

Plaintiff further alleges that under the laws of the State of Texas defendant was and is required and it was and is its duty to stop as many as four trains each way carrying passengers for hire, if so many are run daily (Sundays excepted) at all county seat stations for a time sufficient to receive and let off passengers thereat but notwithstanding said duty and requirement defendant has utterly ignored the same and has and continues to unlawfully and wilfully refuse to stop said trains Nos. 17 and 18 at said county seat station at Meridian, although defendant does stop both of said trains at each and every other county seat station in this State on its said line of railroad and also stops said trains at various and sundry other stations on said line which are not county seat stations, for the purpose of receiving and letting off passengers thereat.

9.

Plaintiff further alleges that under the laws of the State of Texas and under the aforesaid order, rule and regulation of the Railroad Commission of Texas defendant was and is required and it was and is its duty from and after the 2nd day of April, 1912, to stop said trains numbers 17 and 18 and each of them each day at said station at Meridian for a sufficient time to receive and let off passengers thereat but that notwithstanding which defendant has failed and refused and still continues to fail and refuse to obey or comply with the laws of this State and the said order of the Railroad Com-
7 mission of Texas and will so continue to refuse to stop said trains Nos. 17 and 18 at Meridian unless compelled and required to do so by your Honor's most gracious writ of mandamus and mandatory injunction.

10.

Plaintiff further alleges that defendant has failed and refused to comply with the aforesaid laws of this State or to obey the aforesaid lawful order and requirement of the Railroad Commission of Texas and has continuously from and since the said 2nd day of April, 1912, failed and refused and still fails and refuses to stop said trains numbers 17 and 18 and each of them at said county seat station at Meridian for the purpose of receiving and letting off passengers thereat and that each and all of said failures and refusals of defendant was and is wilful, whereby defendant has become liable and indebted to the plaintiff in the penal sum of five thousand dollars for each and every time it has failed and refused to stop said trains and each of them at said station.

11.

Wherefore, plaintiff prays that defendant be cited to answer this petition and for judgment against defendant for a penalty of five thousand dollars for each and every failure of defendant to stop said trains Nos. 17 and 18 and each of them at said county seat station at Meridian from and since the 2nd day of April, 1912, to the date of

trial hereof, and on final trial hereof for the issuance of your Honor's most gracious writs of mandamus and mandatory injunction, compelling and requiring defendant to obey said laws and said lawful order of said Railroad Commission of Texas and to stop said trains Numbers 17 and 18 and each of them, each day, at said County Seat Station at Meridian for a sufficient time to receive and let off passengers thereat, for all costs of suit and for general relief.

8

JEWEL P. LIGHTFOOT,
Attorney General,
JAMES D. WALTHALL,
E. B. ROBERTSON,
Assistants Attorney General,
Attorneys for Plaintiff.

(Endorsed:) No. 28,844. The State of Texas vs. Gulf, Colorado & Santa Fe Ry. Co. Original Petition. Filed in District Court, Travis County, Texas, 53rd Judicial District, May 1st, 1912. D. J. Pickle, Clerk. By S. A. Philquist, Deputy.

Defendant's 1st Amended Original Answer.

Filed June 20th, 1913.

In the District Court of Travis County, Fifty-third Judicial District.

No. 28844.

STATE OF TEXAS
vs.
GULF, COLORADO AND SANTA FE RAILWAY COMPANY.

Now comes the defendant, leave of Court first had and obtained, and files this its First Amended Original Answer, in lieu of Original Answer heretofore filed herein, and by way of amendment, defendant excepts to plaintiff's petition and says same is not good in law, shows no cause of action, and of this, prays judgment of the court.

By way of special exception, defendant says that that portion of plaintiff's petition wherein recovery is sought under the general laws of this State, shows no cause of action, for the reason that the statute relied upon and under which such recovery is sought,

9 is inoperative and void, for this that the Act of the Legislature requiring railroads to stop four trains each way carrying passengers for hire, if so many are run daily, Sundays excepted, to stop at all County seat stations, same being Paragraph 2, Section 1, Chapter 117 of the Twenty-eighth Legislature is void because said Act of the Legislature and the paragraph above referred to was not enacted, as required under the Constitution of Texas, and same violates Section 35, Article 1 of said Constitution, in that said Act con-

tains more than one subject, and the particular portion thereof herein complained of, is not expressed in the title.

Wherefore said Act as to the portion thereof relied upon in this suit, is void.

For answer, if required, defendant denies each and singular the allegations in said petition contained, says same are not true in fact and of this puts itself upon the country.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
Attorneys for Defendant.

For further and special answer in this behalf, if required, defendant says that plaintiff ought not to recover therein nor be afforded the relief prayed for, or any relief, because at and during all the time mentioned in plaintiff's petition, this defendant was and is a common carrier by railroad, engaged in the transportation of both passengers and property between points in the State of Texas and between points in said State and points in Louisiana, Oklahoma, Kansas, Missouri, Illinois and various other states of the United States, and foreign countries, and that as such common carrier, it is and was subject to the Act to regulate commerce, approved February 4th, 1887, and the Acts amendatory thereof and supplementary thereto.

That this defendant is engaged in interstate commerce and in the handling and carrying thereof, including passengers for hire, that its passenger trains Number- 17 and 18 are interstate trains; that the railroad of this defendant insofar as said two trains are concerned, extends from Galveston, Texas, to Purcell in Oklahoma, at which latter place it connects with the line of the Atchison, Topeka and Santa Fe Railway Company, which last mentioned line runs and extends from Purcell through Kansas City, Missouri, and to Chicago, Illinois; it likewise extends to Denver, Colorado, and to Los Angeles and San Francisco, in the State of California; that the lines of this defendant in connection with the line of The Atchison, Topeka and Santa Fe Railway Company, forms and constitutes a through route for the carriage of passengers for hire, as well as freights, from Galveston, Texas, to the various places named above and many others; that this defendant in connection with The Atchison, Topeka and Santa Fe Railway Company, maintain a through passenger train service between Galveston, Texas, and Kansas City, Missouri, Chicago, Illinois, Denver, Colorado and many other places; that the said Trains Number- 17 and 18 are interstate trains, running between Galveston, Texas, through Purcell in Oklahoma, and to the points above named, situated on the line of The Atchison, Topeka and Santa Fe Railway Company; that said trains were primarily put on for the purpose of handling this through traffic, and for the purpose of giving a quick through passenger service and for the purpose of handling the interstate passenger business of this defendant.

That there are other railroads maintaining a through passenger service between Galveston and other points in South Texas, includ-

ing Houston and San Antonio, as does this defendant, and with which lines this defendant is in strong competition for passenger business originating at points in South Texas, including those just above named, and points in the North, East and West, including
Kansas City, Missouri, Chicago, Illinois, Denver, Colorado,
11 Los Angeles and San Francisco in California. That such through traffic is desirable and is sought by each of the competitors of this defendant company, including the Trinity and Brazos Valley Railway Company, the Houston and Texas Contral Railroad Company, Missouri, Kansas and Texas Railway Company of Texas, and the connections of each of said lines, and that it is necessary for this defendant company to maintain a fast schedule on its Trains Number- 17 and 18, which are and were the ones provided therefor in order to compete for this business.

That neither trains 17 nor 18 were and are designed to care especially for the local business between the local stations on defendant's line of road, but rather to handle the through business originating at points in Texas and destined to points beyond the limits of the State of Texas and vica Versa, and likewise for the swift and rapid transportation of the United States Mail for which this defendant has a contract with the Federal Government, and that it is necessary, in order to hold said contract, and comply with the requirements of the Post Office Department of the United States Government, that said mails originating at points in the North, East and West and destined for South Texas points, and vica versa, should have rapid transit; it is likewise necessary to maintain a fast schedule in through service such as is maintained on Trains 17 and 18 to compete with other lines of railway in the rapid dispatch of the United States Mails.

That in addition to Trains Numbers 17 and 18, this defendant avers that it has three other passenger trains passing the station of Meridian each way each day and each scheduled to stop thereat, and that any destination to be reached from Meridian on Trains 17 and 18 can likewise be reached by the use of the other trains scheduled to stop thereat, and this defendant avers further that the trains which are scheduled to stop at Meridian are adequate to take care of the passenger business originating at that station and
passenger business destined thereto; that Meridian is a small
12 town of but comparative small commercial importance, and that the business originating thereat and destined thereto does not and will not warrant and justify this defendant in stopping its through trains at said town; that there is no necessity therefor and that this defendant has, by the other trains which are scheduled to stop at that point, provided the people of that community, with all of the train service that is reasonably necessary to take care of the demands of the travelling public at that place, and this defendant here now avers that as it has provided all of the accommodations by way of train service at said station that are necessary, or that are demanded by the volume of business originating there and destined to that point, that it cannot be required to stop any other, further or additional passenger train at said place, and in this con-

nection, in view of the allegations appearing in this answer, defendant avers that neither of these trains 17 nor 18, are under the circumstances, subject to the order or jurisdiction of the Railroad Commission of Texas, and that in view of the facts as above alleged, that the order of the Railroad Commission of Texas set out in plaintiff's petition is null and void, insofar as same is an attempt to require this defendant to stop said trains or either of them, at said station, and that said commission was without the right, power or authority to enter and enforce the order so promulgated; that same is violative of Paragraph 3, Section 8, Constitution of the United States, in that same is an attempt to regulate commerce among the several States, which is beyond and without the power of the Railroad Commission of Texas, and beyond and without the power of the Legislature of Texas, and for which any statute of the State of Texas which attempts to regulate and require the stoppage of through interstate passenger trains at a given station, is null and void and not enforcible; and defendant further avers that the order of the Railroad Commission of Texas, on which this suit was
13 predicated, in view of the facts above alleged and of the further fact, which is specially pled, that this defendant has provided adequate train service at Meridian, is unreasonable, is arbitrary and enforcement thereof would be violative of the Fourteenth Amendment to the Constitution of the United States, in that it would deprive the defendant company of its property without due process of law, and is a denial to it of the equal protection of the laws.

That any statute of Texas which attempts to require the Railway Company to stop any particular number of trains at any station, is inoperative under the facts in this case and wholly inapplicable and not enforcible, because the two trains in question, for the reasons above stated, are not subject to any such statute.

Wherefore this defendant, specially pleading the above facts, avers that the order of the Railroad Commission of Texas on which this suit is predicated, was issued without authority and same is unreasonable and arbitrary, and was and is an attempt to exercise a power and authority not warranted under the Constitution of the United States, and is an undue, unwarranted, unlawful, arbitrary and unnecessary interference with the control and management of the defendant's property, and of Interstate Commerce.

2.

If it shall be determined that defendant's trains in question are subject to the regulation and control of the Railroad Commission, which, however, is specially denied, yet this defendant says that the statute of the State under which it is proposed to assess a penalty for a violation of such order is cruel and unusual and the fine therein provided for is excessive. That said statute is not enforcible and the attempt of the State to collect a penalty as prayed for in this action, is a violation of Section 13, Article 1 of the Consti-
14 tution of Texas and is likewise a violation of the Constitution of the United States, and the Fourteenth Amendment

thereto, because the fine sought to be imposed is excessive, cruel and unusual and wholly out of proportion to the acts committed. And tends to deprive the defendant of its property without due process of law and denies to it the equal protection of the law. These facts are plead in bar of the imposition of any fine as prayed for in plaintiff's petition.

This defendant having answered fully herein, asks to be discharged with its costs, as in duty bound will ever pray.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
Attorneys for Defendant.

(Endorsed:) 28,844. The State of Texas vs. G. C. & S. F. Ry. Co. Def't's 1st Amended Orig. Answer. Filed June 20, 1913. D. J. Pickle, Clerk, by O. P. Bonner, Deputy.

Plaintiff's First Supplemental Petition.

Filed June 20th, 1913.

In the District Court of Travis County, Texas, 53rd Judicial District.

No. 28844.

STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

To Hon. George C. Calhoun, Judge of said Court:

Comes now the State of Texas, plaintiff in the above styled and numbered cause, through her Attorney General, B. F. Looney, and files this, her first supplemental petition in said cause, supplemental to her original petition filed herein heretofore on the first day of May, A. D. 1912, and in reply to the first amended original
15 answer filed herein by the Defendant heretofore on the 20th day of June, A. D. 1913, and for such supplemental petition says:

I.

Plaintiff specially excepts to that portion of the special answer of the Defendant contained in its first amended original answer, which reads as follows, to-wit: "That the railroad of this Defendant in so far as said two trains are concerned, extends from Galveston, Texas, to Purcell, in Oklahoma." Plaintiff says that under the laws of the State of Texas, and under the character of the defendant railway company, the Defendant had no authority to construct, own or operate a line of railroad outside of the State of Texas, and that said allegation is immaterial and irrelevant to any issue involved in this cause and presents no defense to the cause of action alleged by the plaintiff, and of this plaintiff prays judgment.

II.

Plaintiff specially excepts to all of the special answer of the Defendant contained in its first amended original answer for the reason that it was the duty of the defendant by virtue of the provisions of Articles 6657 and 6658 Revised Statutes of 1911, if it desired to contest said order of the Railroad Commission, to bring suit on its own motion and in its own behalf in a court of competent jurisdiction in Travis County, Texas, against the Railroad Commission of Texas, for the purpose of contesting the validity of said order of the Railroad Commission, and to have the same set aside. Plaintiff says said special answer is insufficient and presents no defense against the cause of action alleged by the plaintiff, for the reason that it does not appear that the Defendant has availed itself of, and pursued the remedy provided for such cases by said Article of the Revised Statutes, and because the matters and things alleged in said special answer, by reason of the failure of the
16 Defendant to contest the same as aforesaid, became and are res adjudicata, and the order of the Railroad Commission by reason of such failure to pursue such statutory remedy on the part of the Defendant became, and is a final judgment and of this Plaintiff prays the judgment of the court.

III.

Plaintiff further specially excepts to said special answer of the defendant, and says that the same is insufficient to present any defense to the cause of action alleged by Plaintiff, for the reason that sufficient facts, if true, are not alleged to show that the order of the Railroad Commission is unreasonable or a regulation of, or interference with, interstate commerce, and of this it prays judgment.

IV.

For special reply and answer to the special answer alleged by the Defendant in its first amended original answer Plaintiff says that the matters and things therein plead, even if true, which is not admitted, became, and are res adjudicata, and the order of the Railroad Commission set out in Plaintiff's original petition became, and is a final judgment, binding upon the defendant, for the reason that the Defendant has not pursued the statutory remedy provided in Articles 6657 and 6658 Revised Statutes of 1911, said remedy being exclusive, and that by such failure to pursue such statutory remedy the Defendant has acquiesced in, and consented to said order of the Railroad Commission, and is now estopped and precluded from attacking same upon the ground that said order is unreasonable, and upon the ground that said order in its effect constitutes an interference with regulation of, or burden upon interstate commerce.

Wherefore by reason of the premises, and the premises set out in the Plaintiff's original petition and in this supplemental
17 petition, Plaintiff says that the Defendant Company has wilfully failed and refused to perform the duties alleged, the

same being duties enjoined upon it by law, and has wilfully failed and refused and neglected to obey a lawful requirement, order, judgment or decree made by the Railroad Commission of Texas as in said order contained, each and every time the Defendant has failed and refused to cause each of its passenger trains, numbers 17 and 18 to stop at its station, and in the town of Meridian, during the period of time alleged, for the purpose of receiving and discharging passengers, and the Defendant became and is liable to the State of Texas, Plaintiff herein, in the sum of five thousand dollars ($5000.00) for each and every failure to stop each of said trains on each of the days since the second day of April, A. D. 1912, up to and including the date of the trial hereof, and the plaintiff prays for judgment against the defendant for the sum of five thousand dollars ($5000.00) for each and every such violation of its lawful duty and said order of the Railroad Commission, for all costs of suit, for mandamus or mandatory injunction ordering the Defendant to comply with said order of the Railroad Commission and to stop each of said trains at said town each day as in her original petition prayed, and for such other relief, both general and special, to which she may be entitled in law or equity.

B. F. LOONEY,
Attorney General;
LUTHER NICKELS,
Assistant Attorney General, Attorneys for Plaintiff, State of Texas.

(Endorsed:) No. 28,844. 53rd District Court, Travis County, Texas. State of Texas vs. G. C. & S. F. Ry. Co. Plaintiff's First Supplemental Petition. Filed June 20, 1913, D. J. Pickle, Clerk. By O. P. Bonner, Deputy.

18 *Judgment.*

June 27th, A. D. 1913.

28844.

THE STATE OF TEXAS
vs.
G., C. & S. F. RY. CO.

On this the 20th day of June, A. D. 1913, came on the above styled and numbered cause for trial in regular order, and came the parties by their Attorneys; and came the defendant by its Attorney and presented its general demurrer and special exception to plaintiff's petition; and came the plaintiff by its Attorneys and presented its special exceptions, numbers 1 and 2, contained in its supplemental petition to the defendant's answer and said exceptions being heard and the argument of Counsel thereon being heard the Court took the same under advisement to be disposed of in connection with the case on the merits; and the same having been considered by the Court,

it is the opinion of the Court that each and all of said exceptions filed and presented by each of the parties should be overruled. It is therefore adjudged and decreed by the court on this, the 27th day of June, A. D. 1913, that each and all of said exceptions filed and presented by each of the parties to this cause be, and the same are hereby overruled.

And on the 20th day of June, A. D. 1913, came on the above styled and numbered cause in regular order for trial and came the parties, plaintiff and defendant by their respective attorneys and announced ready for trial and a jury having been waived, the matters of fact as well as of law were submitted to the Court; and the pleadings of the respective parties having been read to the Court and considered by it, and the evidence having been introduced by the respective parties and heard by the court and argument of Counsel having been heard by the Court the Court took the same under advisement; and the same having been fully considered by the
19 Court it is the opinion of the Court that the law and facts are with the plaintiff.

Now, on the 27th day of June, A. D. 1913, it is therefore, ordered, adjudged and decreed by the court that the plaintiff, the State of Texas, do have and recover of and from the defendant, the Gulf, Colorado & Santa Fe Railway Company, the sum of Twenty-two Thousand four hundred dollars ($22,400.00) together with all costs in this behalf incurred, for all of which it may have its execution.

It is further ordered, adjudged and decreed by the court that the defendant, The Gulf, Colorado & Santa Fe Railway Company, should be and it is hereby ordered and commanded from and after this date to stop and cause to be stopped, at its station in the town of Meridian, Bosque County, Texas, its south bound passenger train, now known as number 17, and its north bound passenger train, now known as number 18, for the purpose of receiving and discharging passengers at said station, and for a time on each week day sufficient for such purpose, and fully to comply with an order to this effect made and entered by the Railroad Commission of Texas, heretofore on the 11th day of March, A. D. 1912, said order becoming effective heretofore on the 2nd day of April, A. D. 1912; and it is further ordered, adjudged and decreed that the plaintiff, the State of Texas, should be, and it is hereby awarded mandatory injunction to compel compliance with said order of the Railroad Commission, and this judgment of the court ordering the defendant to stop each of said trains daily at said place as aforesaid, and all appropriate writs and process will issue hereon to enforce the provisions of this judgment.

20 *Defendant's Motion for New Trial.*

Filed June 27th, 1913.

In the District Court of Travis County, 53d Judicial District, April Term, 1913.

No. 28844.

THE STATE OF TEXAS
v.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Now comes the defendant and asks that the Judgment herein rendered be set aside and a new trial granted, for the following reasons:

1.

The Court erred in overruling and failing to sustain defendant's special exception to the plaintiff's petition.

2.

The Court erred in holding that the order of the Railroad Commission of Texas requiring the defendant company to stop its trains Nos. 17 and 18 at Meridian was valid and enforceable, for the reason that under the evidence adduced on the trial of this case neither of said trains was subject to the order and jurisdiction of the Railroad Commission of Texas, because the evidence affirmatively shows that said trains were interstate in character and used primarily for the purpose of handling interstate commerce; and the order of the Commission as herein sued upon was void, and the Commission had no jurisdiction to enter the same or any other order as affecting the stoppage of said trains at any point.

3.

The evidence conclusively shows that the defendant company is stopping at Meridian all of the trains that are and were reasonably necessary to accommodate the traveling public thereat, and that the defendant had and has provided by the use of other trains
21 all of the service incumbent upon it under the law, and which said service is adequate and reasonably sufficient for the accommodation of the traveling public to or from the station of Meridian; and the judgment of the Court, therefore, rendered herein for the State, is not supported in the evidence and has no evidence to sustain it, and the same is and was an interference with the defendant in the handling of its interstate commerce; and in all of these respects the judgment of the Court is erroneous and ought to be set aside.

4.

The evidence in this case shows conclusively that each and both of the trains which were ordered to be stopped at Meridian by said order of the Railroad Commission, and for the failure to do which this suit was instituted, were interstate trains, running between Galveston, Texas, to points outside of and beyond the limits of said State; that they were primarily initiated and put on for the handling of interstate business and the rapid transit of the United States mails; and the evidence further showing, as it does, without conflict, that the defendant company had and has by the use of other trains which do stop at Meridian afforded to the people of that community adequate train service and all that was reasonably necessary to accommodate the traveling public at said place, wherefore the judgment of the Court rendered herein and based upon the order of the Railroad Commission of Texas is and was violative of paragraph 3, section 8, of the Constitution of the United States, in that the same is an attempt to regulate commerce among the several States, and is therefore void, and the judgment rendered in behalf of the State under these circumstances ought to be set aside.

5.

The court erred in entering judgment herein awarding to
22 the State of Texas a writ of mandamus and mandatory injunction requiring the defendant to stop its trains 17 and 18 at Meridian, for the reason that it affirmatively appears that by other trains which do stop at the station of Meridian adequate train service in all respects reasonable is afforded to the people of that community—such evidence showing, as it does, that three other trains in each direction are stopped at that station for the purpose of receiving and discharging passengers.

6.

The judgment of the court herein is erroneous, because the evidence affirmatively shows that the two trains in question, to-wit: Nos. 17 and 18 handle the United States mail under a contract with the United States Government; that they are through trains, which, in connection with the Atchison, Topeko & Santa Fe Railway Company, afford a through and rapid service between Galveston and the cities North and East; and in view of these facts, which appear without conflict, and of the further fact that adequate train service is afforded to the people of Meridian by other trains, the judgment of the court is erroneous and violative of the Fourteenth Amendment to the Constitution of the United States, and same is a taking of the defendant's property without due process of law and is a denial to it of equality before the law.

7.

The Court erred in rendering judgment herein for the plaintiff in the sum of $22,400.00, for the reason that if the defendant is liable

herein it — liable only for one violation, and only one penalty should have been assessed.

8.

The Court erred in rendering judgment herein in the sum of $22,400.00, for the reason that if the defendant is liable herein it cannot be assessed for two penalties for each day that it failed to stop its trains Nos. 17 and 18 at Meridian; and the judg-
23 ment rendered herein is and does allow to the plaintiff a separate penalty for each train that failed to stop at Meridian for each day after the order of the Railroad Commission went into effect; and the court erred in holding and concluding that the penalty statute under which this suit was maintained authorized the assessing of a penalty on that basis.

9.

The evidence in this case shows that no other train besides those which stop at Meridian is necessary for the accommodation of the traveling public thereat; and the judgment of the court herein, as well as the order of the Railroad Commission in this cause, imposes an unreasonable burden upon the defendant and requires of it an unnecessary service, and same is therefore an infringement of the private rights of the defendant company.

10.

The statute under which the fine assessed herein was imposed is unconstitutional and void, and the fine herein assessed is excessive and out of proportion to the offense committed, if any; and such fine is therefore violative of the Fourteenth Amendment to the Constitution of the United States, as well as of Section 13, Article 1 of the Constitution of Texas, in that said fine is cruel and an unusual penalty is thereby assessed. The judgment is excessive because this was and is a friendly law suit, and because the Railroad Commission was and is not really seeking or asking to collect penalties, but was and is seeking to test the authority of the Commission.

11

The evidence in this case shows affirmatively that the amount of business originating at and destined to Meridian does not and will not warrant the defendant in stopping any other, further or additional trains at that place, and does not warrant defendant in stopping its trains Nos. 17 and 18 thereat; that any destination to be reached by either of said trains can be reached by other
24 trains which are scheduled to stop thereat, and that as said trains are interstate trains, handling interstate commerce in sharp competition with other lines of railroad engaged in similar business, the statute of the State of Texas under which the order of the Railroad Commission was issued and the order of the Railroad Commission itself and the judgment of the Court rendered herein

are unconstitutional and void and violative of paragraph 3, Section 8, of the Constitution of the United States, and same ought to be set aside.

Wherefore defendant files this its motion for a new trial and asks that same be granted.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
Attorneys for Defendant, Gulf, Colorado & Santa Fe Ry. Co.

(Endorsed:) No. 28,844. The State of Texas v. G. C. & S. F. Ry. Co. Defendant's Motion for New Trial. Filed June 27, 1913. D. J. Pickle, Clerk.

Order on Motion.

June 27th, 1913.

28844.

THE STATE OF TEXAS
vs.
G., C. & S. F. RY. Co.

And now on this the 27th day of June, A. D. 1913, came the parties plaintiff and defendant by their respective Attorneys and thereupon came on to be heard by the Court the defendant's motion for a new trial of this cause, and the Court after having heard the said motion, evidence and argument of Counsel thereon and having duly considered the same is of the opinion and so finds that the said motion is not well taken.

25 It is Therefore ordered, adjudged and decreed by the court that the said motion of defendant for a new trial of this cause be and the same is hereby now overruled and refused:

To which ruling of the court and judgment heretofore rendered herein the said defendant then and there in open court duly excepted and in open court gave notice of appeal to the Court of Civil Appeals for the 3rd Supreme Judicial District of Texas, at Austin.

It is further ordered by the Court that sixty-five days from and after this date be and is allowed within which to have prepared and filed Statement of Facts and bills of exception herein; and the defendant in open Court requests the Court to file herein his conclusions of facts and law.

Findings of Fact & Conclusions of Law.

Filed July 8th, 1913.

In the District Court of Travis County, Texas, 53d Judicial District.

No. 28844.

STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Findings of Fact.

First. On the first day of August, 1911, and continuously since said date, the defendant was and is a railroad corporation duly organized and existing under the laws of the State of Texas and on said date and continuously since, owned, controlled and operated a line of railroad in the State of Texas, extending from the City of Galveston in said state to and through the county seat—cities and towns of Richmond, Bellville, Brenham, Caldwell, Cameron, Meridian, Cleburne, Fort Worth and Gainesville, all in the State
26 of Texas, and during all of said times, said defendant maintained depots, stations and station buildings in each and all of said towns.

Second. That the City of Meridian was and is the county seat of Bosque County, Texas, and was and is incorporated under the General Laws of the State of Texas, as a city having one thousand inhabitants and over, and now has a population of about 1500.

Third. That on the 11th day of March, 1912, the Railroad Commission of Texas, after notice having been theretofore duly given and after a hearing upon said subject, at which defendant had appeared before said Railroad Commission of Texas, duly made and entered the following order, rule and regulation, to wit:

Hearing No. 1248.

"Office of Railroad Commission of Texas.

Meridian Petition *of* Stop Trains Nos. 17 and 18 on G., C. & S. F. Ry. Co.

AUSTIN, TEXAS, March 11, 1912.

The above numbered and entitled cause having been called for hearing by the Railroad Commission of Texas on the 13th day of February, 1912, and the parties (petitioners and said Gulf, Colorado and Santa Fe Railway Company) appeared in pursuance of previous notice duly given by the Commission, and the Commission having heard the evidence offered and the facts presented pertaining to the matters covered by the petition and notice aforesaid, and having

duly considered the same, the Commission finds that Meridian is the County Seat of Bosque County, Texas, and is a regular station on the line of railroad of the Gulf, Colorado and Santa Fe Railway Company; that said Railway Company now runs and operates three trains carrying passengers each way daily over its said line and passing said station at Meridian and that two only of said trains,
27 each way daily, stop at said station for the purpose of receiving and letting off passengers, and that one of said trains, each way daily, to-wit, trains numbers 17 and 18, pass, but do not stop at said station at Meridian for the purpose of receiving and letting off passengers thereat, and that the trains which do stop at said station as aforesaid are inadequate and insufficient to accommodate the needs of the business at said station and for the proper accommodation of the traveling public.

"Therefore, by virtue of the authority conferred upon it by law, it is hereby ordered by the Railroad Commissioners of Texas, that from and after the 2nd day of April, 1912, the Gulf, Colorado and Santa Fe Railway Company be and it is hereby ordered and required to regularly and daily stop said trains numbers 17 and 18, at said station at Meridian, the County Seat of Bosque County, Texas, for a time sufficient to receive and let off passengers with safety at said station at Meridian.

"It is further ordered that a copy of this order, be, by the Secretary, immediately forwarded to said Railway Company for its information and observance.

WILLIAM D. WILLIAMS,
JOHN L. WORTHAM,
Commissioners."

Attest:
E. R. McLEAN, *Secretary.*

Said order has been in force and non-repealed or set aside continuously since the second day of April, A. D. 1912, up to the date of trial and final judgment herein.

Fourth. That since the said 11th day of March, 1912, and upon each day since said date, the defendant has continued to operate said two passenger trains aforesaid, namely, Nos. 17 and 18, as
28 aforesaid, without stopping either of said trains at said City of Meridian for the purpose of discharging or receiving passengers at its station in said city of Meridian, or for any other purpose, except that on the days hereinafter indicated said trains were stopped at said City of Meridian for the purpose of receiving and discharging passengers and for other purposes, to-wit:

No. 17 was so stopped October 21, 1912.
" 17 " " " " 21, 1912.
" 18 " " " " 22, 1912.
" 18 " " " " 26, "
" 18 " " " " 27, "
" 17 " " " " 29, "
" 18 " " " " 29, "
" 18 " " " " 30, "
" 17 " " " November 1, "
" 17 " " " " 2, "
" 18 " " " " 2, "
" 18 " " " " 3, "
" 17 " " " " 4, "
" 17 " " " " 5, "
" 18 " " " " 5, "
" 18 " " " " 6, "
" 17 " " " " 7, "
" 18 " " " " 7, "
" 17 " " " " 8, "
" 18 " " " " 8, "
" 18 " " " " 9, "
" 18 " " " " 10, "
" 17 " " " " 11, "
" 18 " " " " 11, "
" 18 " " " " 15, "
" 18 " " " " 16, "
29
" 18 " " " " 17, "
" 18 " " " " 21, "
" 17 " " " " 22, "
" 18 " " " " 22, "
" 2-17 " " " " 22, "
" 2-18 " " " " 22, "

This was done as an experiment. The number of passengers received and the number of passengers discharged, at Meridian, Texas, by said trains on the dates above when they were stopped there, as above stated, was as follows:

Date.	Train.	No. passengers for Meridian.	No. passengers from Meridian.	No. of sleeping car passengers for Meridian.
10/21.....	17	2	..	..
10/21.....	18	1	..	..
10/22.....	18	1	..	..
10/26.....	18	1	..	..
10/27.....	18	1	..	..
10/29.....	18	2	..	2
10/30.....	18	..	1	..
11/ 1.....	17	1	2	..
11/ 3.....	18	4	1	..
11/ 4.....	17	2	2	..
11/ 5.....	18	1	1	..
11/ 5.....	17	..	1	..
11/ 6.....	18	1	1	..
11/ 7.....	17	1	..	..
11/ 7.....	18	1	..	..
11/ 8.....	17	1	..	..
11/ 8.....	18	..	1	..
11/ 9.....	18	1	..	..
11/10.....	18	1	..	..
11/11.....	18	1	..	..
11/11.....	17	3	..	..
11/15.....	18	1	..	..

30 The settled portion of the town of Meridian is located between a mile and a quarter and a mile and a half from the defendant's depot, this depot and station being within the corporate limits of Meridian.

The fact that these trains would be, or were to be, stopped at Meridian during this period of time was not advertised at Meridian or elsewhere, nor was advice given to the people of Meridian to that effect. Only one person at Meridian, besides defendant's employees—knew that the trains did stop on the occasions above named. During that period of time the agent of defendant at Meridian informed at least one citizen of Meridian who desired to take passage on train No. 17 that it would not stop to receive him. During that period of time the agents of defendant at Galveston, Texas, refused to sell a citizen of Meridian,—who was then in Galveston,—a ticket to Meridian good for passage on train 18. During the same period of time defendant's agents at Beaumont sold tickets to two persons,—residents of Meridian,—good for passage on train No. 18; these persons used the tickets, but were informed by the Auditor or Conductor of Train 18 before its arrival at Clifton,—a point twelve or thirteen miles south of Meridian and not a county seat town,—that the train would not stop at Meridian, and caused them to leave the train at Clifton upon its arrival and stoppage there. During this period of time one citizen of Meridian went to defendant's depot at that place and saw train 18 pass at a rapid rate of speed and without stopping.

Fifth. The following one-way, round-trip, and coupon tickets were

sold to passengers by defendant at its station at Meridian, Texas, for the months named:

31

Month.	No.	Single trip amount.	No.	Round trip amount.	No.	Coupon amount.	Total.
1911.							
April	379	338.20	98	179.35	33	93.80	$611.35
May	403	327.67	115	286.13	46	154.35	768.15
June	222	400.05	155	229.20	37	106.00	735.25
July	478	451.30	245	326.55	55	159.40	937.25
August	506	585.75	124	302.20	82	611.50	1499.45
Sept.	473	389.90	135	241.60	49	184.95	816.45
1913.							
Jan'y	405	382.35	128	224.30	37	155.00	761.65
Feb'y	338	358.50	146	259.35	36	102.95	720.80
March	400	360.50	183	297.55	26	104.65	762.70

One way and round trip tickets were sold by defendant at Meridian for the months named as follows:

Oct.	1911,	one-way	468;	Round trip,	638,—	value,	$1094.31
Nov.	"	"	480	"	204	"	848.64
Dec.	"	"	530	"	248	"	822.36
Jan.	1912,	"	324	"	84	"	396.97
Feb.	1912,	"	298	"	121	"	468.80
Mar.	1912,	"	358	"	195	"	732.60
Apr.	"	"	464	"	166	"	662.33

The defendant received revenue from the sale of tickets at Meridian, Texas, for the months named below as follows:

June,	1912	$747.67
July,	"	1059.45
Aug.	"	1331.45
Sept.	"	913.10
Oct.	"	1121.65
Nov.	"	1445.10
Dec.	"	875.10
April,	1913	775.75
May	"	780.85

32 The following one-way and round trip tickets were sold by defendant to passengers destined to Meridian for the months named:

	One-way.	Round T.	Value.
May	365	136	440.70
June	443	97	520.40
July	475	118	580.50
August	478	97	461.00
September	588	374	894.25
October	396	104	492.70
November	437	106	539.45
December	443	290	674.55
January	334	127	389.15
February	277	94	404.65
March	333	155	500.55
April	425	163	570.30

That during the year beginning with May, 1911, there were sold tickets at the stations named below as follows:

Station.	Amount.	Station.	Amount.
Alvin	29,469.83	McGregor	22,054.85
Bellville	12,540.47	Rogers	20,764.21
Caldwell	20,847.56	Rosenberg	18,750.73
Cameron	41,141.07	Sealy	19,930.75
Clifton	16,729.20	Somerville	21,809.18
Milano	14,818.17	Wallis	9,186.64

And that the population of said last named places as shown by the United States Census of 1910 was as follows:

Alvin	1453	Bellville	1250
Caldwell	1476	Cameron	3263
Clifton	1137	Milano	500
Morgan	831	McGregor	1864
Rogers	1275	Rosenberg	1198
Sealy	2250	Somerville	2070
Wallis	1000		

33 That defendant stops its trains Nos. 17 and 18 at those stations named below: At Alvin, Caldwell, Cameron, Clifton, Milano, Morgan, Rosenberg, Sealy, Somerville, Wallis.

For the months comprising the year ending with May, 1913, the defendant received revenue from the sale of tickets at the stations named below as follows:

Month.		Moody.	McGregor.	Valley Mills.	Clifton.
June	1912....	1,446.56	2,194.75	867.80	1,441.59
July	" ...	2,181.75	3,382.80	1,332.30	2,278.96
Aug.	"	2,299.50	4,368.90	1,495.15	2,743.66
Sept.	"	2,144.95	2,693.80	1,164.45	1,955.23
Oct.	"	3,965.00	4,444.85	1,357.64	2,352.85
Nov.	"	2,598.60	3,463.05	1,254.08	2,449.92
Dec.	"	2,197.40	3,474.45	1,017.80	1,775.55
Jan.	1913....	1,306.95	1,896.55	789.15	1,248.01
Feb.	"	1,115.10	1,768.60	683.50	1,424.14
Mar.	"	1,322.95	1,790.00	951.15	1,879.14
Apr.	"	1,122.40	1,932.25	781.50	1,339.14
May	"	1,489.78	2,453.90	1,024.90	1,589.62
	Total...	23,290.93	33,832.90	12,719.42	22,478.62

Sixth. Both train No. 17 and No. 18 are scheduled to stop and do stop daily at every county seat town on the line of defendant in Texas, except Meridian.

Seventh. Both train No. 17 and train No. 18 are scheduled to stop and do stop daily at Clifton, a town twelve or thirteen miles south of Meridian in Bosque County. Clifton has a population of 1137. The trains usually take water at Clifton, but the principal reason for their stoppage there was and is on account of the revenue derived from passenger business there.

Eighth. Defendant stops its trains Nos. 17 and 18 daily at Morgan, another town in Bosque County, Texas, about seven miles north of Meridian, and having a population of 831 in 1910.

34 Ninth. Defendant stops trains Nos. 17 and 18 at the town- of Alvin, Caldwell, Cameron, Milano, Rosenberg, Sealy, Somerville, Wallis, Bellville, Brenham, Temple, Cleburne, Ft. Worth, Houston, and Gainesville, all in the State of Texas.

Tenth. In order to have trains 17 and 18 go through the City of Houston, defendant causes them to leave its main line and run over a branch line and a line of another road into and out of Houston, the extra mileage of this detour being forty-eight or fifty miles.

Eleventh. Both train No. 17 and train No. 18 are by defendant regularly scheduled to stop daily at every station in the State of Oklahoma between the Texas State line and Purcell, Oklahoma, the names and populations of such stations and towns being as follows:

Thackerville	Population	154
Marietta	"	1546
Overbrook	"	118
Ardmore	"	8618
Berwyn	"	378
Daugherty	"	278
Wynnewood	"	2032
Paul's Valley	"	2689
Paoli	"	239
Wayne	"	332
Purcell	"	2740

Twelfth. During the month of September, 1912, train No. 18 was regularly scheduled by defendant, and advertised to the public, to stop daily at Meridian, but it was not stopped at said place on any day during said month, and the employes in charge of said train were ordered by defendant not to stop it at Meridian.

35 Thirteenth. Train number 17 is a south bound passnegr train scheduled to pass through the town of Meridian daily at 11:20 P. M. Train number 18 is a north bound passenger train scheduled to pass through Meridian daily at 5:25 A. M.

Fourteenth. On each of the days between April 2, 1912 and June 27, 1913, defendant operated through the town of Meridian, Texas, its south bound passenger train number 11, which was scheduled to arrive and stop at Meridian at 7:56 P. M. This train runs between Purcell, Oklahoma and Temple, Texas.

Fifteenth. On each of the days between April 2, 1912, and June 27, 1913, plaintiff operated its south bound passenger train number 5 through the town of Meridian. This train was scheduled to arrive at the station in the town of Meridian at 10:38 A. M. daily. This train runs between Purcell, Oklahoma, and Galveston, Texas.

Sixteenth. On each of the days between April 2, 1912, and June 27, 1913, defendant operated through the town of Meridian its north bound passenger train number 6, which was scheduled to arrive at and stop at the station in Meridian at 5:25 P. M. daily. This train runs between Galveston, Texas and Purcell, Oklahoma.

Seventeenth. On each of the days between April 2, 1912 and June 27, 1913, defendant operated through the town of Meridian its north bound passenger train number 12, which was scheduled to arrive at and stop at Meridian at 9:03 A. M. daily. This train runs between Temple, Texas and Purcell, Oklahoma.

Eighteenth. On each of the days between January 9, 1913, and June 27, 1913, defendant operated through the town of Meridian its north bound passenger train number 16, which was scheduled to arrive at and stop at Meridian at 4:52 A. M. This train only stops at Meridian when flagged. It runs between Temple, Texas and Cleburne, Texas.

Nineteenth. On each of the days between January 9, 1913, and June 27, 1913, the defendant operated through the town of
36 Meridian its south bound passenger train number 15 which was scheduled to arrive at and stop at Meridian at 11:48 P. M. This train runs between Cleburne, Texas, and Temple, Texas.

Twentieth. Prior to January 9, 1913, for three or four months defendant ran two sections of trains number- 17 and 18 which performed the same service as trains 15 and 16. These second sections stopped at Meridian.

Twenty-first. Prior to June first, 1913, none of the passenger trains operated by the defendant carried sleepers or pullmans south of Cleburne, Texas, except trains Nos. 17 and 18. Since June first, 1913, trains number- 11 and 12 carry a sleeper to and from Waco, Texas. This is "the Waco service."

Twenty-second. A passenger going from Meridian to any point south, if trains 17 and 18 are not stopped at Meridian cannot get

pullman or sleeper service out of Meridian on any of the defend ant's trains, that is to say in order to get a sleeper or Pullman service south a passenger would have to go to Temple on train number 11, leaving Meridian at 7:56 P. M. and arriving at Temple at 10:00 P. M. and there await for the arrival of train number 17 due at 1:05 A. M., or he could leave train 11 at Clifton at 8:17 P. M. and there await the arrival of train number 17 at 11:36 P. M. or he could by private conveyance drive through the country twelve or thirteen miles from Meridian to Clifton and there board train number 17 at 11:36 P. M.

Twenty-third. A passenger from the north cannot get pullman or sleeper service into Meridian, if trains Nos. 17 and 18 are not stopped there. If he desires this service he must leave train number 17 at Cleburne, Texas, at 9:50 P. M. and take some other train into Meridian, or he must pass through Meridian to Clifton and there leave the train and catch some other train back into Meridian, or drive through the country.

Twenty-fourth. A passenger from the south to Meridian
37 cannot get pullman or sleeper service to Meridian if trains Nos. 17 and 18 are not stopped there. If he desires this service he must use train number 18 to Temple, disembarking there at 3:50 A. M. and catch some other train into Meridian, or else he may disembark from number 18 at Clifton at 5:28 A. M. and catch train number 12 at 8:45 A. M. for Meridian or drive through the country from Clifton to Meridian.

Twenty-fifth. On account of their inability to get sleeper or pullman service out of Meridian except upon the conditions described, many passengers desiring such service travel to Waco over the line of the defendant company at an added expense, and there take trains of some other company which furnish sleeper and Pullman accommodation.

Twenty-sixth. A drawing room sleeping car operated by defendant between Kansas City and San Antonio south bound is brought from Kansas City to Ft. Worth by train number 11, due to arrive at Ft. Worth at 5:20 P. M. daily. It is then placed in train number 17 due to leave Ft. Worth at 8:55 P. M. and carried by it to Milano Junction, due to arrive there at 2:48 A. M. The car is there set out to be carried thence by the I. & G. N. Ry. Co. A sleeping car operated by defendant, south bound, between Ft. Worth and San Angelo is carried by train number 17 from Ft. Worth to Temple and is there set out to be carried thence by train number 77. The sleeping car operated by defendant between Dallas and Galveston, south bound, is carried from Dallas to Cleburne by train number 68, arriving at Cleburne at 9:50 P. M. and is there picked up by train number 17 at 10:15 P. M. and carried to Galveston.

Twenty-seventh. The sleeping car operated by the defendant, north bound, between Galveston and Dallas is carried from Galveston to Cleburne by train number 18 arriving at Cleburne at 6:50 A. M. and the car is carried from Cleburne to Dallas by train num-
38 ber 67, leaving Cleburne at 7:05 A. M. The sleeping car operated by defendant, north bound, between San Antonio

and Kansas City is carried by the I. & G. N. Ry. Co. to Milano Junction, and is there picked up by train number 18 and carried to Ft. Worth, arriving at 8:10 A. M. where it is set out and later picked up by train number 12 at 11:30 A. M. and carried north. The sleeping car operated by defendant from San Antonio to Ft. Worth is brought by train number 78 to Temple arriving at Temple at 12:40 A. M. and is there picked up by train number 18 at 4:00 A. M. and carried north to Ft. Worth.

Twenty-eighth. During the summer months between the first of June and the first of October of each year train number 18 carries a sleeping car from Galveston to Ft. Worth, and there delivers it to the Ft. Worth and Denver City Railway Company to be carried to Denver.

Twenty-ninth. At Milano Junction train number 18 picks up a chair car brought from San Antonio to the I. & G. N. Railway Company. Number 17 also sets out a chair car at Milano Junction to be carried to San Antonio by the I. & G. N. Ry. Co. at Cleburne, Texas, both trains 17 and 18 change engines and crews. Both the trains are reswitched and number 18 picks up some baggage cars and express cars. Prior to January 9, 1913, number 18 picked up an express car at Temple, and number 17 set out an express car at Temple. The equipment of train number 18 when it leaves Galveston, Texas, is a mail car, first and second class coach and two sleepers, and during the summer months an additional sleeper is added to be delivered to the Ft. Worth and Denver City Railway Company at Fort Worth.

Thirtieth. Many people desiring to take trains number- 17 and 18 at Meridian, on account of the failure of these trains to stop there, drive through the country by private conveyance twelve or fifteen miles to Clifton or seven or eight miles to Morgan, and take the trains at one of the other of these places. For this reason
39 a considerable proportion of the revenue shown to be derived by defendant from its passenger business at Clifton is revenue that would be derived by defendant on its passenger business at Meridian if these trains stopped at Meridian. Many passengers on trains 17 and 18, on account of the failure of these trains to stop at Meridian, disembark therefrom at Morgan or at Clifton and there drive through the country to Meridian, or else wait for some train that stops at Meridian.

Thirty-first. The passenger trains of defendant are scheduled to stop at Clifton as follows: number 11, 8:17 P. M. number 17, 11:36 P. M.; number 5, 10:56 A. M.; number 6, 5:08 P. M.; number 18, 5:28 A. M.; number 12, 8:45 A. M.; and are scheduled to stop at Morgan as follows: number 11, 7:41 P. M. number 17, 11:05 P. M.; number 5, 10:16 A. M.; number 6, 5:47 P. M.; number 12, 9:18 A. M.

Thirty-second. Trains numbers 11, 12, 5, 6, 15 and 16 are each and all trains doing purely local service and stopping at all stations between their respective termini. None of these trains carry sleepers south of Cleburne except as herein before stated with reference to trains 11 and 12, and the remainder of the equipment on each and

all of these trains is much inferior to the equipment carried on trains 17 and 18.

Thirty-third. Prior to January 9, 1913, the service furnished to the traveling public at Meridian, exclusive of trains 17 and 18, and exclusive of the days on which trains 17 and 18 were stopped there, was wholly inadequate to serve the needs of the traveling public.

Thirty-fourth. Continually since the second day of April, 1912, the service and accommodations furnished by the defendant at Meridian, exclusive of trains 17 and 18 was wholly inadequate to serve and accommodate the comfort and convenience of the traveling public except on the days when trains 17 and 18 actually stopped at Meridian as stated above.

40 Thirty-fifth. Many residents of Meridian and vicinity make trips to points in other states than the State of Texas and return. Exclusive of trains 17 and 18 these passengers have no access to any through train of the class or equipment of numbers 17 and 18.

Thirty-sixth. The order of the Railroad Commission ordering the stoppage of trains 17 and 18 is an aid to inter-state commerce insofar as such commerce arises at or is destined to Meridian.

Thirty-seventh. Trains numbers 17 and 18 carry United States Mail. Exclusive of train 17 the residents of Meridian and vicinity have access to only one mail train south bound, daily, which train passes Meridian at 10:33 A. M. In order to post mail destined to points south of Temple after 10:33 A. M. each day, residents of Meridian are compelled to place the mail on north bound train number 6, which passes Meridian at 5:25 P. M. and let it be carried in this case north to Cleburne and there be transferred to south bound train number 17. The residents of Meridian and vicinity have access only to one north bound mail train daily, and that is train number 6, passing Meridian at 5:25 P. M. The order of the Railroad Commission ordering the stoppage of trains 17 and 18 at Meridian is an aid to the interchange and passage of the United States Mail by virtue of the conditions stated hereinbefore.

Thirty-eighth. It would require four or five minutes loss of time daily to stop train number 17 at Meridian for the receipt and discharge of passengers and mail. This is the average length of time required to stop a train of the same character as train number 17. It would require the loss of about ten minutes' time to stop train number 18 at Meridian for the receipt and discharge of passengers and mail, and the stoppage of either or both of trains number 17 and 18 is not an unreasonable burden upon the defendant, but is a reasonable regulation and requirement.

41 Thirty-ninth. There are a large number of towns other than county seat towns on the defendant's line in Texas where trains 17 and 18 stop for the receipt and discharge of passengers. The principal reason for the stoppage of these trains at those points from the standpoint of the defendant is the revenue to be derived at those points.

Fortieth. Both trains 17 and 18 carry interstate passengers, both of these trains also carry a large number of interstate passengers

between each and all of the points where they stop in Texas, the proportion as between interstate and intrastate traffic on these trains is not disclosed. The defendant at one time made a practice of ttransporting a passenger who desired to take either train 17 or 18 from Meridian to Cleburne on another train, free of charge, and allowed such passenger on his return trip to Meridian to leave train 17 or 18 at Cleburne and then be transported from Cleburne to Meridian on another train of the defendant free of charge. This practice has been abrogated by the defendant and now a passenger taking those trains under such conditions is compelled to pay his regular transportation charges both ways between Cleburne and Meridian. The passenger fare one way between Cleburne and Meridian is $1.10 and the round trip fare is $2.00.

Forty-first. The period of time from April 2, 1912 to June 27, 1913 both dates inclusive, was composed of 452 days, including 64 Sundays and 388 week days. During this period of time train number 17 stopped at Meridian on eleven days in October and November, 1912, and train number 18 stopped at Meridian twenty one days in October and November, 1912, under the conditions and circumstances stated in the fourth finding above. The period of time from January 9, 1913, to June 27, 1913, both dates inclusive,
was composed of 146 week days and 24 Sundays. On each
42 of these days neither train 17 nor 18 stopped at Meridian, but
on each of them train 15 stopped at Meridian and train 16 stopped at Meridian when flagged. That is to say trains 15 and 16 were so stopped at Meridian during the said period of time on 146 week days.

Excluding from the period of time between April 2, 1912, and June 27, 1913, both dates inclusive, the period of time elapsed between January 9, 1913, and June 27, 1913, train number 17 failed to stop at Meridian on 232 week days, and train number 18 failed to stop at Meridian on 222 week days.

During the period of time covered by four months prior to January 9, 1913, 106 week days and 15 Sundays intervened, one of which week days was excluded in the days mentioned in finding five above. Excluding all the week days for four months prior to January 9, 1913, and all the week days between January 9, 1913, and June 27, 1913, both dates inclusive, train number 17 failed to stop at Meridian on 127 week days, and train number 18 failed to stop at Meridian on 117 week days.

During the period of time covered by three months prior to January 9, 1913, thirteen Sundays and 78 week days elapsed excluding every week day included in the period of time covered by three months prior to Jan. 9, 1913, and every week day since Jan. 9, 1913, up to and including June 27, 1913, and excluding the days mentioned in finding five above, train number 17 failed to stop at Meridian on 154 week days between April 2, 1912, and June 27, 1913, and train number 18 failed to stop at Meridian on 144 week days between April 2, 1912, and June 27, 1913.

Forty-second. The failure of the defendant to have each of trains

17 and 18 to stop at Meridian on each of the days when it did fail to stop between April 2, 1912 and June 27, 1913, was willful and intentional, and was an intentional and wilful violation of the order of the Railroad Commission of Texas involved in this case ordering a stoppage of each of said trains at said place.

43 Forty-third. The sum of $100.00 per day is a just and reasonable penalty to be imposed upon the defendant for its failure and refusal to stop each of said trains on each and every day on which it was its legal duty to stop the same at Meridian.

Forty-fourth. When train number 18 leaves Galveston it carries one mail car, one coach, one sleeper for Dallas to be set out at Cleburne, one sleeper for Kansas City, one sleeper for Ft. Worth to be delivered to the Ft. Worth & Denver Railway Company.

At Milano Junction it picks up one sleeper for Kansas City to be set one at Ft. Worth and one chair car for Kansas City. This sleeper and chair car having been brought from San Antonio by the I. & G. N. Railway Company.

At Temple it picks up a sleeper for Ft. Worth, same having been brought from San Angelo by train number 78.

At Cleburne the train changes engine and crew, is reswitched and picks up some baggage and express cars. It sets out the Dallas sleeper brought from Galveston.

At Ft. Worth it sets out a sleeper from San Angelo, picked up at Temple. It sets out a sleeper for Kansas City from San Antonio, picked up at Milano Junction. It sets out the mail car and picks up another mail car.

Between Ft. Worth and Purcell the equipment is as follows: One mail car picked up at Ft. Worth, baggage and express cars (Picked up at Cleburne), one chair car (for Kansas City from San Antonio, picked up at Milano Junction) one chair car (for Newton, Kansas, from Galveston), one sleeper (from Galveston to Kansas City). The only equipment in the train when it arrives at Purcell that was in the train when it left Galveston is the Newton, Kansas, chair car and the Kansas City sleeper.

44 At Purcell the Newton, Kansas chair car, the Galveston-Kansas City sleeper and the San Antonio-Kansas City chair car are delivered to the A. T. & S. F. Ry. Co., and these cars are carried thence in a train of the latter company bearing number 18-8.

At Wichita, Kansas, this train picks up one sleeper for Kansas City.

At Newton, Kansas, this train sets out the chair car from Galveston and picks up one sleeper for St. Joseph, Missouri, to be set out at Topeka.

At Topeka, Kansas, the train sets out the St. Joseph sleeper.

The only car that was in the original train 18 when it left Galveston that is carried north of Newton, Kansas, is the Galveston sleeper. The Kansas City chair car, picked up by train 18 at Milano Junction is carried north of Newton in this train.

At Kansas City the San Antonio chair car and the Galveston sleeper and the sleeper picked up at Wichita, Kansas, are set out.

From Kansas City to Chicago, train 18-8 is made up of entirely new equipment, consisting of a cafe-observation car, pullmans, etc. picked up at Kansas City.

Forty-fifth. The only passenger car equipment in train number 17 when it leaves Purcell that is brought south from Kansas City or other points, is the Kansas City-Galveston sleeper, and the Kansas City-San Antonio chair car.

At Ft. Worth number 17 picks up a Kansas City-San Antonio sleeper, the same having been brought to Ft. Worth by train number 11. It also picks up a sleeper for San Angelo to be set out at Temple. At Cleburne or Temple it sets out the express cars, and at Milano Junction it sets out the Kansas City-San Antonio sleeper and chair car, having changed engines and crews at Cleburne.

45 Forty-sixth. At Alvin train number 18 picks up the passengers of the defendant who have gone to Alvin on train number 5 and who are destined to Houston.

Forty-seventh. A portion of defendant's interstate passengers between Kansas City and San Antonio and Galveston come down to Ft. Worth on the sleeper hauled to that place by train number 11 which arrives at Ft. Worth at 5:20 P. M. and are carried thence on train number 17 which leaves Ft. Worth at 8:55 P. M.

Forty-eighth. To require trains number- 17 and 18 to stop at Meridian for the purpose of receiving and discharging purposes is not, and will not be an unreasonable burden upon the defendant, or delay to its said trains, but is a reasonable requirement and will greatly serve the needs, comfort and convenience of the traveling public, and the residents of Meridian and vicinity.

Conclusions of Law.

1. The order of the Railroad Commission of Texas of date March 11, 1912, requiring the defendant to stop its trains Nos. 17 and 18 at Meridian, Texas, is valid and in compliance with the power given in section 2 of Article 6676 of the Revised Statutes of Texas, 1911.

2. Said order of the Railroad Commission is not a regulation of interstate commerce, nor is it an interference with or burden upon such commerce, but rather tends to facilitate both intrastate and interstate commerce and promotes the convenience of the traveling public.

3. Whatever effect said order may have upon interstate commerce is only incidental and not an unreasonable restraint or interference with interstate commerce.

4. The other passenger trains provided by defendant outside of trains Nos. 17 and 18 were not and are not adequate and sufficient to accommodate the local and interstate passenger traffic on defendant's line of railway, so far as the town of Meridian is concerned, inasmuch as no trains other than Nos. 17 and 18 have any sleeping-car accommodations or facilities.

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5. Said trains Nos. 17 and 18 of defendant are not engaged solely

in interstate commerce, but a part of the travel upon said trains is intrastate.

6. Said defendant has willfully violated and disobeyed said order of the Railroad Commission of Texas by failing to stop its said trains Nos. 17 and 18 at the station of Meridian, as required by said order, there being not more than four trains carrying passengers each way daily, including said trains Nos. 17 and 18, there being 224 failures to stop said trains.

7. For each of said 224 violations of said order by said defendant in failing to stop said trains Nos. 17 and 18 at said town of Meridian, the county seat of Bosque County, as aforesaid, I have assessed a penalty of one hundred dollars, aggregating $22,400.00, and have entered judgment accordingly.

GEO. CALHOUN,
Judge Fifty-third Judicial District.

(Endorsed:) No. 28844. State of Texas v. G. C. & S. F. Ry. Co. Findings of Fact & Conclusions of law. Filed July 8th, 1913. D. J. Pickle, Clerk.

Appeal Bond.

Filed July 16th, 1913.

District Court, Travis County.

No. 28844.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

47 Whereas, in the above numbered and entitled cause, pending in the District Court of Travis County, State of Texas, and at a regular term of said court, to-wit: on the Twenty-seventh day of June, 1913, the said The State of Texas recovered judgment against the Gulf, Colorado & Santa Fe Railway Company for the sum of Twenty-two Thousand Four Hundred and no/100 Dollars with interest thereon from the twenty-seventh day of June, A. D. 1913, at the rate of six per cent per annum, and all costs of suit, and writ of mandamus and mandatory injunction was awarded from which judgment the said Gulf, Colorado & Santa Fe Railway Company has taken an appeal to our Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, and desires to suspend the execution of said judgment during the pendency of said appeal;

Now, therefore, we, the said Gulf, Colorado & Santa Fe Railway Company as principal, and the other subscribers hereto as sureties, acknowledge ourselves bound to pay to the said The State of Texas the sum of Fifty-thousand and no/100 ($50,000.) Dollars, conditioned that the said Gulf, Colorado & Santa Fe Railway Company

shall prosecute its appeal with effect and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, that it shall perform its judgment, sentence or decree, and pay all such damages as said court may award against it, the said Gulf, Colorado & Santa Fe Railwy Company.

Witness our hands, this 14th day of July, A. D. 1913.

GULF, COLORADO & SANTA FE RAILWAY CO.,
By TERRY, CAVIN & MILLS,
Its Solicitors.

H. O. STEIN.
SEALY HUTCHINGS.

Approved July 16, 1913.
D. J. PICKLE, *Clerk.*

48 THE STATE OF TEXAS,
County of Galveston:

I, J. C. Gengler, Clerk of the District Court in and for said County of Galveston, do hereby certify that H. O. Stein and Sealy Hutchings, whose names appear signed to the annexed bond, are good, ample security for the amount therein stipulated; that they have property in said County subject to execution to a larger amount, and that if said bond was offered to me for approval, the same would be accepted and approved.

To certify which, I hereunto set my hand and the impress of my official seal at my office, in the City of Galveston on this the 14th day of July, 1913.

[SEAL.]

J. C. GENGLER,
Clerk District Court, Galveston County,
By W. L. HANSCOM, *Deputy.*

(Endorsed:) No. 28844. In District Court, Travis County. The State of Texas vs. Gulf, Colorado & Santa Fe Railway Co. Appeal Bond. Filed July 16th, 1913. D. J. Pickle, Clerk, District Court, Travis County.

Assignments of Error.

Filed August 22, 1913.

In District Court of Travis County for the 53rd Judicial District.

No. 28884.

THE STATE OF TEXAS
vs.
GULF, COLORADO AND SANTA FE RAILWAY COMPANY.

Now comes the defendant and files the following as its assignments of error herein:

49 *First Assignment of Error.*

The court erred in overruling and failing to sustain defendant's special exception to the plaintiff's petition, all of which was presented in defendant's motion for a new trial in the first ground thereof.

Second Assignment of Error.

The Court erred in holding that the order of the Railroad Commission of Texas requiring the defendant company to stop its trains Nos. 17 and 18 at Meridian was valid and enforceable, for the reason that under the evidence adduced on the trial of this case neither of said trains was subject to the order and jurisdiction of the railroad Commission of Texas, because the evidence affirmatively shows that said trains were interstate in character and used primarily for the purpose of handling interstate commerce; and the order of the Commission as herein sued upon was void, and the Commission had no jurisdiction to enter the same or any other order as affecting the stoppage of said trains at any point, all of which was presented in defendant's motion for a new trial in the second ground thereof.

Third Assignment of Error.

The evidence conclusively shows that the defendant company is stopping at Meridian all of the trains that are and were reasonably necessary to accommodate the traveling public thereat and that the defendant had and has provided by the use of other trains all of the service incumbent upon it under the law, and which said service is adequate and reasonably sufficient for the accommodation of the traveling public to or from the station or Meridian; and the judgment of the Court, therefore, rendered herein for the State, is not supported in the evidence and has no evidence to sustain it, and the same is and was an interference with the defendant in the
50 handling of its interstate commerce; and in all of these respects the judgment of the Court is erroneous, and ought to be set aside, all of which was presented in defendant's motion for a new trial in the third ground thereof.

Fourth Assignment of Error.

The evidence in this case shows conclusively that each and both of the trains which were ordered to be stopped at Meridian by said order of the Railroad Commission, and for the failure to do which this suit was instituted, were interstate trains, running between Galveston, Texas, to points outside of and beyond the limits of said State; that they were primarily initiated and put on for the handling of interstate business and the rapid transit of the United States mails; and the evidence further showing, as it does, without conflict, that the defendant company had and has by the use of other trains which do stop at Meridian afforded to the people of that

community adequate train service and all that was reasonably necessary to accommodate the traveling public at said place, wherefore the judgment of the Court rendered herein and based upon the order of the Railroad Commission of Texas is and was violative of paragraph 3, section 8, of the Constitution of the United States, in that the same is an attempt to regulate commerce among the several States, and is therefore void, and the judgment rendered in behalf of the State under these circumstances ought to be set aside, all of which was presented in defendant's motion for a new trial in the fourth ground thereof.

Fifth Assignment of Error.

The Court erred in entering judgment herein awarding to the State of Texas a writ of mandamus and mandatory injunction requiring the defendant to stop its trains 17 and 18 at Meridian, for the reason that it affirmatively appears that by other trains which do stop at the station of Meridian adequate train service in
51 all respects reasonable is afforded to the people of that community—such evidence showing, as it does, that three other trains in each direction are stopped at that station for the purpose of receiving and discharging passengers, all of which was presented in defendant's motion for a new trial in the fifth ground thereof.

Sixth Assignment of Error.

The judgment of the Court herein is erroneous, because the evidence affirmatively shows that the two trains in question to-wit: Nos. 17 and 18, handle the United States mails under a contract with the United States Government; that they are through trains, which, in connection with the Atchison, Topeka & Sante Fe Railway Company afford a through and rapid service between Galveston and the cities North and East; and in view of these facts, which appear without conflict, and of the further facts that adequate train service is afforded to the people of Meridian by other trains, the judgment of the court is erroneous and violative of the Fourteenth Amendment to the Constitution of the United States, and same is a taking of the defendant's property without due process of law and is a denial to it of equality before the law, all of which was presented in defendant's motion for a new trial in the sixth ground thereof.

Seventh Assignment of Error.

The Court erred in rendering judgment herein for the plaintiff in the sum of $22,400.00, for the reason that if the defendant is liable herein it is liable only for one violation, and only one penalty should have been assessed, all of which was presented in defendant's motion for a new trial in the seventh ground thereof.

Eighth Assignment of Error.

The court erred in rendering judgment herein in the sum
52 of $22,400.00, for the reason that if the defendant is liable herein it cannot be assessed for two penalties for each day

that it failed to stop its trains Nos. 17 and 18 at Meridian; and the judgment rendered herein is and does allow to the plaintiff a separate penalty for each train that failed to stop at Meridian for each day after the order of the Railroad Commission went into effect; and the court erred in holding and concluding that the penelty statute under which this suit was maintained authorized the assessing of a penalty on that basis, all of which was presented in defendant's motion for a new trial in the eighth ground thereof.

Ninth Assignment of Error.

The evidence in this case shows that no other train besides those which stop at Meridian is necessary for the accommodation of the traveling public thereat; and the judgment of the court herein, as well as the order of the Railroad Commission in this cause, imposes an unreasonable burden upon the defendant and requires of it an unnecessary service, and same is therefore an infringement of the private rights of the defendant company, all of which was presented in defendant's motion for a new trial in the ninth ground thereof.

Tenth Assignment of Error.

The statute under which the fine assessed herein was imposed is unconstitutional and void, and the fine herein assessed is excessive and out of proportion of the offense committed if any; and such fine is therefore violative of the Fourteenth Amendment to the Constitution of the United States, as well as of Section 13, Article 1, of the Constitution of Texas, in that said fine is cruel and an unusual penalty is thereby assessed. The judgment is excessive because this was and is a friendly law suit; and because the railroad commission was and is not really asking or seeking to collect penalties, but was and is seeking to test the authority of the
53 Commission; all of which was presented in defendant's motion for a new trial in the tenth ground thereof.

Eleventh Assignment of Error.

The evidence in this case shows affirmatively that the amount of business originating at and destined to Meridian does not and will not warrant the defendant in stopping any other, further or additional trains at that place, and does not warrant defendant in stopping its trains Nos. 17 and 18 thereat; that any destination to be reached by either of said trains can be reached by other trains which are scheduled to stop thereat, and that as said trains are interstate trains, handling interstate commerce in sharp competition with other lines of railroad engaged in similar business, the statute of the State of Texas under which the order of the Railroad Commission was issued and the order of the Railroad Commission itself and the judgment of the Court rendered herein are unconstitutional and void and violative of paragraph 3, Section 8, of the Constitution of the United States, and same ou-t to be set aside, all of which was presented in defendant's motion for a new trial in the eleventh ground thereof.

Twelfth Assignment of Error.

The Court erred in its findings of fact and in the seventh paragraph thereof in finding that the principal reason for the stoppage of trains Nos. 17 and 18 at Clifton was and is on account of the revenue derived from passenger business there. Such a finding has absolutely no support in the evidence and is directly contradictory to any evidence in the case, same is on a material issue and the court was unauthorized in making such a finding.

Thirteenth Assignment of Error.

The court erred in its eight- finding of fact wherein it is stated that trains Nos. 17 and 18 stopped daily at Morgan. There
54 is no evidence to support such a finding and same is contradictory to the evidence and has no evidence to sustain it.

Fourteenth Assignment of Error.

The court erred in its twelfth finding of fact wherein it is stated that during the month of September, 1912 train No. 18 was regularly scheduled to stop daily at Meridian. There is no evidence to support such a finding and the court was unauthorized under the evidence to so find.

Fifteenth Assignment of Error.

The court erred in its fourteenth finding of fact wherein it is stated that passenger train No. 11 runs between Purcell, Oklahoma, and Temple, Texas, the facts being that said train runs between Temple, Texas and Kansas City, Missouri, which is shown by all of the evidence in this case.

Sixteenth Assignment of Error.

The court erred in its fifteenth finding of fact in stating that train No. 5 runs between Purcell, Oklahoma and Galveston, Texas. The undisputed evidence shows said train runs between Chicago, Illinois and Galveston, Texas, and the finding of the court as above set out is without evidence to sustain it.

Seventeenth Assignment of Error.

The court erred in its sixteenth finding of fact in stating that train No. 6 runs between Purcell, Oklahoma, and Galveston, Texas. The undisputed evidence shows said train runs between Chicago, Illinois and Galveston, Texas, and the finding of the court as above set out is without evidence to sustain it.

55 Eighteenth Assignment of Error.

The court erred in its seventeenth finding of fact wherein it is stated that train No. 12 runs between Temple, Texas, and Purcell,

Oklahoma. The undisputed evidence shows that said train runs between Temple, Texas and Kansas City, Missouri.

Nineteenth Assignment of Error.

The court erred in its finding of fact No. 32 in stating that the equipment on the other passenger trains run by the defendant Company through Meridian is much inferior to the equipment carried on trains 17 and 18. There is no evidence to support such a finding in the record. It is purely the creature of imagination and in truth is directly contrary to all the evidence in the case.

Twentieth Assignment of Error.

The court erred in its thirty-fourth finding of fact wherein it is stated that the service and accommodation furnished by the defendant at Meridian, exclusive of trains 17 and 18, was wholly inadequate to serve and accommodate the comfort and convenience of the traveling public. Such a finding of fact is wholly immaterial to any proper or legal issue in this case, nor is same supported by any of the evidence offered.

Twenty-first Assignment of Error.

The court erred in its finding of fact No. 35 wherein it is stated that residents of Meridian who make trips to other States have no access to any through train of the class or equipment of Nos. 17 and 18. Such a finding of fact is directly contradicted by the agreed statement of facts in this case, by which agreed statement the State is bound, and there is no evidence in this record to sustain such a finding, but the evidence and agreed statement of facts clearly show
that any destination which is reached by trains Nos. 17 and
56 18 can be reached by the use of the other trains which do stop at Meridian, and there is not a particle of evidence in the record to the effect that the equipment on the other trains is any different from that on trains 17 and 18 except that some of them do not afford Pullman car accommodation, but this accommodation is one not required of the defendant as a common carrier, nor the people of Meridian or any other community entitled thereto from the defendant as a common carrier.

Twenty-second Assignment of Error.

The court erred in its thirty-sixth finding of fact wherein it is stated that the order of the Railroad Commission ordering the stoppage of trains 17 and 18 at Meridian is an aid to interstate commerce. There was certainly no evidence to sustain such a finding and the same is purely a creature of the imagination of the learned District Judge preparing the same.

Twenty-third Assignment of Error.

The court erred in its finding No. 37 wherein it is found that exclusive of trains 17 and 18 the residents of Meridian have access to only one main train south bound daily and only access to only one mail train north bound daily. There is no evidence in this record to sustain such a finding of fact and the trial court erred in so concluding. Such a finding is not only contradictory to all of the evidence but is highly prejudicial to the defendant in this case.

Twenty-fourth Assignment of Error.

The court erred in its finding of fact No. 39, in that there is no evidence indicating that the principal reason for stopping this train at other points is the revenue to be derived. There is not a line of evidence to this effect in the record, but the record does
57 affirmatively show the reason for the stopping of these trains at the places named, which is an entirely different reason from the one found by the court. Wherefore, the finding in this behalf in wholly unsupported by the evidence and directly contradicted by the evidence.

Twenty-fifth Assignment of Error.

The court erred in its finding of fact No. 42, in that there is and was no evidence indicating that the failure of the defendant to stop these trains at Meridian was wilful. The evidence shows unmistakably that the trains were not stopped because there was no necessity for it, and because the trains were interstate in character and that it was an inconvenience of the defendant Company to so stop. The court was not warranted in finding under the evidence adduced on the trial of this case that the failure in this behalf was wilful.

Twenty-sixth Assignment of Error.

The court erred in its finding of fact No. 43 wherein it is stated that the sum of $100.00 is a just and reasonable penalty for its failure to stop the said trains as required. Such a penalty is wholly out of proportion to the alleged defense and amounts in effect to confiscation. This was unwarranted, oppressive, is not supported under the evidence, and same is not supported in law or fact.

Twenty-seventh Assignment of Error.

The court erred in its forty-fifth finding of fact to the effect that the only passenger equipment in train No. 17 when it leaves Purcell is the Kansas City-Galveston sleeper and the Kansas City-San Antonio chair car. This finding of fact is not supported by the evidence.

Twenty-eighth Assignment of Error.

The court erred in its conclusion of law No. 4 wherein it is held that the service afforded to the people of Meridian is not adequate and sufficient inasmuch as no trains other than 17 and 18
58 have any sleeping car accommodations or facilities. This conclusion of law places a burden upon the defendant not warranted by any statute in this State and not warranted under the order of the Railroad Commission of Texas ordering the stopping of these trains at Meridian. This defendant is not required to furnish sleeping car accommodations to any community and the facts as to whether or not the service afforded to any place is adequate and sufficient may not even in part be determined by reference to the sleeping car accommodations furnished. Such a conclusion of law imposes a liability upon this defendant which is unwarranted and the Honorable Trial Court basing its judgment, as it does, upon such a conclusion erred.

Twenty-ninth Assignment of Error.

The conclusion of law No. 5 as stated by the Court to the effect that a part of the travel on trains 17 and 18 is intrastate is wholly immaterial and the judgment of the court based in part as it is upon such a construction of law is erroneous. The description of this train as interstate in character cannot in law be denied to the defendant simply because it does carry intrastate passengers.

Thirtieth Assignment of Error.

The court erred in its conclusion of law No. 6 wherein it is found as a matter of law that the defendant had wilfully disobeyed the order of the Commission because not more than four trains carrying passengers each way pass Meridian. If the service afforded to the people of Meridian was adequate it then had a right to run interstate trains through said station without stopping although not more than four passenger trains daily were run each day.

59 Thirty-first Assignment of Error.

The order of the Railroad Commission of Texas on which this suit was predicated is and was void, and was made without authority of law, for this, that the statute regulating the stopping of trains at county seats is and was mandatory, and no discretion relative thereto was lodged with the Railroad Commission, and whether or not the train service at Meridian was adequate, was an immaterial inquiry, and the finding of the Commission to the effect that the train service thereto was not adequate did not empower the Commission to enter the order that was entered, and on which suit herein was filed.

Thirty-second Assignment of Error.

The findings of the trial court herein to the effect that the train service in and to Meridian was inadequate and not sufficient for the comfort or convenience of the people desiring train service at that point, is and was wholly immaterial, and the court was not warranted in entering a judgment against the defendant on such a conclusion of fact.

Thirty-third Assignment of Error.

The judgment entered herein is and was void as to the penalties assessed, for this, that the statute requires as many as four trains per day each way be stopped at all county seats, if so many are run, and the Railroad Commission of Texas was not clothed with the authority to file suit for penalties for the failure of a railway company to comply with said statute, and the District Court of Travis County was without power to assess a penalty for the violation of such statute.

Thirty-fourth Assignment of Error.

There is no statute in this state under which a penalty can be assessed against a railway company for its failure to stop any given number of trains at a county seat station, and the judgment
60 of the District Court of Travis County awarding penalties on such a state of facts is and was without authority of law and void.

Respectfully submitted,

TERRY, CAVIN & MILLS,
A. H. CULWELL,
Attorneys for Defendant, Gulf, Colorado and Santa Fe Railway Company.

(Endorsed:) 28,844. The State of Texas vs. Gulf, Colorado & Santa Fe Ry. Co. Assignments of Error. Filed Aug. 22nd, 1913. D. J. Pickle, Clerk.

Plaintiff's Cross-assignments of Error.

Filed August 23rd, 1913.

In the District Court of Travis County, Texas, 53rd Judicial District.

No. 28844.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Cross-assignments of Error Filed by Plaintiff, The State of Texas.

I.

The Court erred in his sixth conclusion of law which reads as follows:

"Said defendant has wilfully violated and disobeyed said order of the Railroad Commission of Texas by failing to stop its said trains Nos. 17 and 18 at the station of Meridian, as required by said order, there being not more than four trains carrying passengers each way daily, including said trains Nos. 17 and 18, there being
61 224 failures to stop said trains." Wherein the violation of the Railroad Commission's orders involving the suit was limited to 224 failures to stop the trains in question at Meridian since April 2nd, 1912, because the evidence showed that the defendant has willfully failed and refused to stop each of said trains in compliance with said order on each and every day between April 2nd, 1912, and the date of the trial of said cause, with the possible exception of having stopped train No. 17 on 11 days and train No. 18 on 20 days during the period of time from October 21st, 1912, to November 22nd, 1912.

II.

The Court erred in the seventh conclusion of law which reads as follows:

"For each of said 224 violations of said order by said defendant in failing to stop said trains Nos. 17 and 18 at said town of Meridian, the county seat of Bosque County, as aforesaid, I have assessed a penalty of one hundred dollars, aggregating $22,400.00, and have entered judgment accordingly."

In that the Court failed and refused to assess a penalty against the defendant for more than 224 violations of said order of the Railroad Commission, and for each and every day that the evidence showed that the defendant had failed to comply with said order as stopping each of its trains Nos. 17 and 18 at Meridian, said order having been disobeyed by the defendant with reference to each of said trains on each and every day between the 2nd day of April 1912, and the date

of the trial of said cause, with the possible exception of 11 days with reference to train No. 17 and 20 days with reference to train No. 18, during the period of time from October 21st, 1912 to November 22nd, 1912.

III.

The Court erred in failing and refusing to render judgment against the defendant for a failing and refusing to stop each of said trains at Meridian on each of the Sundays intervening between the 2nd day of April, 1912, and the date of the trial of said cause,
62 on which the evidence shows said trains were not stopped at Meridian.

IV.

The Court erred in failing and refusing to render judgment against the defendant for a penalty for failure to stop train No. 17 at Meridian on 411 days, and in failing and refusing to render judgment against the defendant for penalties for failure and refusal of the defendant to stop train No. 18 at Meridian on 432 days, as required by said order of the Railroad Commission, the evidence having showed that the defendant willfully failed and refused so to stop either of said trains on said days.

B. F. LOONEY,
Attorney General;
LUTHER NICHOLS,
Assistant Attorney General,
Attorneys for Plaintiff The State of Texas.

(Endorsed:) No. 28,844. The State of Texas vs. G., C. & S. F. Ry. Company. In the District Court of Travis County, Texas. Fifty-third Judicial District. Plaintiff's Cross Assignments of Error. Filed August 23rd, 1913. D. J. Pickle, Clerk. By S. A. Philquist, Deputy.

63 *Bill of Costs.*

No. 28844.

THE STATE OF TEXAS
vs.
G., C. & S. F. RY. CO.

To Officers of Court, Dr.

Clerk's Costs.

Docketing Suit	.20
Issuing Citations and Duplicates	1.25
Issuing copy Petition and Certificate	2.50
Entering Appearances	.30

" Motions	.15
" Orders	.75
Filing Papers	2.70
Entering Judgment	1.50
Issuing Subpoenas	.25
Approving Bond	1.50
Transcript	35.00
Assessing Damages	.50
Taxing Costs	.25
Clerk's Cost forw'd	$46.85

Sheriff's and Miscellaneous Costs.

Clerk's Cost brought forw'd	46.85
Stenographer fee	3.00
G. S. Matthews:	
Venire fee	.50
Subps. & Mil.	.60
Out Co. process	.75
Total	$51.70

64 *Clerk's Certificate.*

THE STATE OF TEXAS,
County of Travis:

I, D. J. Pickle, Clerk of the District Court, within and for the County and State aforesaid, do hereby certify that the within and foregoing on 66 pages is a true and correct Transcript of all proceedings had in this Court in cause No. 28,844, The State of Texas vs. Gulf, Colorado & Santa Fe Railway Company, as the same appear of record and on file in this office,—except the original Statement of Facts.

Given under my hand and seal of office, at Austin, Texas, this the 25th day of August, A. D. 1913.

[SEAL.]

D. J. PICKLE,
Clerk District Court, Travis County, Texas.

(Endorsed:) No. 5300. Assignment. Gulf, Colorado & Santa Fe Railway Company, Appellant, vs. The State of Texas, Appellee. From the District Court of Travis County, for the 53rd Judicial District of Texas, at Austin, Texas. Applied for by Messrs. Terry, Cavin & Mills & A. H. Culwell, Attorneys for Appellant on the 16th day of July, 1913, and delivered to said above named attorneys on the 25th day of August, 1913. D. J. Pickle, Clerk of the District Court of Travis County. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Sep. 3, 1913, R. H. Connerly, Clerk. Affirmed 6-3-14. Overruled 7-1-14.

65 Original.

No. 28844.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Statement of Facts.

Filed July 30, 1913. D. J. Pickle, Clerk.

(Endorsed:) 5300. Filed in Court of Civil Appeals, Third Supreme Judicial District, Austin, Texas, Sep. 3, 1913. R. H. Connerly, Clerk.

In the District Court of Travis County, 53rd Judicial District, April Term, 1913.

No. 28844.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Statement of Facts.

Be it remembered, that upon the trial of the above entitled and numbered cause the following facts were proved and the following evidence was introduced:

The plaintiff introduced and read in evidence the following agreed statement of facts:

In the District Court of Travis County, Texas, 53rd Judicial District.

STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

66 To the Honorable Judge of said Court:

Come now the plaintiff and defendant and, for the purpose of expediting the trial of the above styled and numbered cause, agree that the following facts are true and that their existence may be taken by the court as having been proven upon the trial of said cause:

First. It is agreed that on the first day of August, 1911, and continuously since said date, the defendant was and is a railroad corpora-

tion duly organized and existing under the laws of the State of Texas, and on said date and continuously since, owned, controlled and operated a line of railroad in the State of Texas, extending from the City of Galveston in said state to and through the county seat cities and towns of Richmond, Bellville, Brenham, Caldwell, Cameron, Meridian, Cleburne, Fort Worth and Gainesville, all in the State of Texas, and during all of said times said defendant maintained depots, stations and station buildings in each and all of said towns.

Second. That the city of Meridian was and is the county seat of Bosque county, Texas, and was and is incorporated under the General Laws of the State of Texas as a city having one thousand inhabitants and over.

Third. That on the 11th day of March, 1912, the Railroad Commission of Texas, after notice having been theretofore duly given, and after a hearing upon said subject, at which defendant had appeared before said Railroad Commission of Texas, said Commission duly made and entered the following, order, rule and regulation, towit:

"Office of the Railroad Commission of Texas.

Hearing No. 1248.

Meridian Petition to Stop Trains Nos. 17 and 18 on G., C. & S. F. Ry. Co.

AUSTIN, TEXAS, March 11, 1912.

The above numbered and entitled cause having been called for hearing by the Railroad Commission of Texas on the 13th day of February, 1912, and the parties (petitioners and said Gulf, Colorado & Santa Fe Railway Company) appeared in pursuance of previous notice duly given by the Commission, and the Commission having heard the evidence offered and the facts pre-
67 sented pertaining to the matters covered by the petition and notice aforesaid, and having duly considered the same, the Commission finds that Meridian is the County Seat of Bosque County, Texas, and is a regular station on the line of railroad of the Gulf, Colorado & Santa Fe Railway Company; that said Railway Company now runs and operates three trains carrying passengers each way daily over its said line and passing said station at Meridian and that two only of said trains, each way daily, stop at said station for the purpose of receiving and letting off passengers, and that one of said trains each way daily, towit, trains numbers 17 and 18, pass but do not stop at said station at Meridian for the purpose of receiving and letting off passengers thereat, and that the trains which do stop at said station as aforesaid are inadequate and insufficient to accommodate the needs of the business at said station and for the proper accommodation of the traveling public.

"Therefore, by virtue of the authority conferred upon it by law, it is hereby ordered by the Railroad Commission of Texas, that from

and after the 2nd day of April, 1912, the Gulf, Colorado & Santa Fe Railway Company be and it is hereby ordered and required to regularly and daily stop said trains numbers 17 and 18 at said station at Meridian, the County Seat of Bosque County, Texas, for a time sufficient to receive and let off passengers with safety at said station of Meridian.

"It is further ordered that a copy of this order be, by the Secretary, immediately forwarded to said Railway Company for its information and observance.

WILLIAM D. WILLIAMS,
JNO. L. WORTHAM,
Commissioners."

Attest:
E. R. McLEAN, *Secretary.*

Fourth. That since the said 11th day of March, 1912, and upon each day since said date, the defendant has continued to operate said two passenger trains aforesaid, namely: Nos. 17 and 18, as aforesaid, without stopping either of said trains at said city of Meridian for the purpose of discharging or receiving passengers at its station in said city of Meridian, or for any other purpose, except that on the days hereinafter indicated said trains were stopped at said city of
68 Meridian for the purpose of receiving and discharging passengers and for other purposes, as may appear from the evidence, towit:

No.	17	was	so	stopped	October	21,	1912.
"	18	"	"	"	"	21,	"
"	18	"	"	"	"	22,	"
"	18	"	"	"	"	26,	"
"	18	"	"	"	"	27,	"
"	17	"	"	"	"	29,	"
"	18	"	"	"	"	29,	"
"	18	"	"	"	"	30,	"
"	17	"	"	"	November	1,	"
"	17	"	"	"	"	2,	"
"	18	"	"	"	"	2,	"
"	18	"	"	"	"	3,	"
"	17	"	"	"	"	4,	"
"	17	"	"	"	"	5,	"
"	18	"	"	"	"	5,	"
"	18	"	"	"	"	6,	"
"	17	"	"	"	"	7,	"
"	18	"	"	"	"	7,	"
"	17	"	"	"	"	8,	"
"	18	"	"	"	"	8,	"
"	18	"	"	"	"	9,	"
"	18	"	"	"	"	10,	"
"	17	"	"	"	"	11,	"
"	18	"	"	"	"	11,	"
"	18	"	"	"	"	15,	"

"	18	"	"	"	"	16,	"
"	18	"	"	"	"	17,	"
"	18	"	"	"	"	21,	"
"	17	"	"	"	"	22,	"
"	18	"	"	"	"	22,	"
"	2-17	"	"	"	"	22,	"
"	2-18	"	"	"	"	22,	"

69 Fifth. That this defendant on the first day of August, 1911, and continuously since that date, has operated two passenger trains daily through Meridian in each direction, and all of which are scheduled to stop at said station, and same have been operated through said station on the following schedule thereat: South bound train no. 5 scheduled to arrive at Meridian at 10:38 A. M., South bound train no. 11, scheduled to arrive at Meridian at 7:56 P. M., North bound train no. 6 scheduled to arrive at Meridian at 5:25 p. m., and northbound train No. 12 due to arrive at Meridian at 9:03 a. m., and that any destination that can be reached by trains nos. 17 and 18 can likewise be reached by the use of trains nos. 5, 6, 11 and 12, and that Meridian can likewise be so reached from any point. That the distance from Galveston to Fort Worth by way of the defendant Company's line is 346 miles; that such distance by way of the Trinity & Brazos Valley Railway Company is 325 miles, and by wa of the Houston & Texas Central Railway Company is 343 miles, and by way of the Missouri, Kansas & Texas Railway Company of Texas is 377 miles. That the distance between Houston and Fort Worth by way of the defendant Company is 314 miles, and by way of the Trinity & Brazos Valley Railway Company is 283 miles, by the way of Houston & Texas Central is 286 miles and by way of the Missouri, Kansas — is 328. That the distances between Galveston and Dallas over these lines of road are as follows: Gulf, Colorado & Santa Fe Railway Company, 393 miles, Trinity & Brazos Valley, 302 miles, Missouri, Kansas & Texas, 389 miles, Houston & Texas Central, 315 miles. That the distances between Houston and Dallas via these lines of railway are as follows: Gulf, Colorado & Santa Fe 338 miles, Trinity & Brazos Valley 249 miles, Missouri, Kansas & Texas 339 miles, Houston and Texas Central 284 miles. That the distance from San Antonio to Fort Worth by way of the International & Great Northern and Gulf, Colorado & Santa Fe Companies is 323 miles, and by way of the Missouri, Kansas & Texas it is 278 miles. That the respective distances over these lines of road between said points are as follows: Via the Trinity & Brazos Valley and Missouri, Kansas & Texas to Kansas City it is 819 miles; via the Trinity & Brazos Valley and Rock Island, 928 miles; via the Houston & Texas Central
70 and Frisco 872 miles; via the Missouri, Kansas & Texas, 844 miles, and via the Santa Fe, 951 miles. That the respective distances over these lines of road between Houston and Kansas City are as follows: via the Trinity & Brazos Valley and the Missouri, Kansas & Texas, 766 miles; via the Trinity & Brazos Valley and Rock Island, 875 miles; via the Houston & Texas Central

and Frisco, 816 miles; via the Missouri, Kansas & Texas, 834 miles, and via the Santa Fe, 920 miles. That there is a route and line of road between Galveston and Denver via the Trinity & Brazos Valley and Fort Worth & Denver City, a distance of 1127 miles, and via the Houston & Texas Central and Santa Fe, 1300 miles, and via the Santa Fe alone, 1303 miles. That the distances over these respective routes from Houston to Denver are as follows: Via the Trinity & Brazos Valley and Fort Worth & Denver City, 1074 miles, via the Houston & Texas Central and Santa Fe, 1244 miles and via the Santa Fe alone, 1272 miles.

There are two routes and lines of road between San Antonio and Denver as follows: Via the International & Great Northern and Santa Fe, the distance is 1280 miles, and via the Missouri, Kansas & Texas and Fort Worth & Denver City, 1080 miles.

There are routes and lines of road between Galveston and Houston and Los Angeles as follows: Via the Santa Fe from Galveston to Los Angeles, 2356 miles; Houston to Los Angeles, 2325 miles. From Galveston to Los Angeles via the Southern Pacific Lines the distance is 1696 miles, and from Houston to Los Angeles 1640 miles; and from Galveston to Los Angeles via the Trinity & Brazos Valley, Texas & Pacific, and Southern Pacific Lines, 1750 miles, and from Houston 1697 miles.

That there are the following routes and lines of road between Galveston and Houston and St. Louis: Via the International & Great Northern, Texas and Pacific and Iron Mountain Route, 866 miles, and from Houston, 816 miles; from Galveston via the Southern Pacific and Frisco Lines, 1007 miles, and from Houston 951 miles; from Galveston via the Trinity & Brazos Valley and Missouri, Kansas & Texas Lines, 1069 miles, and from Houston, 1016 miles; from Galveston via the Missouri, Kansas & Texas Lines,
71 1134 miles, and from Galveston, 1084 miles; from Galveston via the Gulf, Colorado & Santa Fe and Frisco lines, 1158 miles, and from Houston, 1127 miles.

That the distance from Kansas City to Chicago by way of the Santa Fe is 458 miles, and that the distance between St. Louis, and Chicago, via the Chicago & Alton Line is 283 miles.

Sixth. That there was sold at Meridian passenger tickets for the twelve months beginning with May 1911, as follows:

	One-way.	Rt.	Value.
May, 1911	435	298	685 23
June	435	290	674 88
July	525	502	883 11
August	557	292	1039 12
September	527	298	698 04
October	468	636	1094 31
November	480	204	848 64
December	530	248	822 36
January	324	84	396 97
February	298	121	468 80
March	358	195	732 60
April	464	166	662 33

That there was sold tickets destined for Meridian during the same period as follows:

To Meridian:			
May	365	136	440 70
June	443	97	520 40
July	475	118	580 50
August	478	97	461 00
September	588	374	894 25
October	396	104	492 70
November	437	106	539 45
December	443	290	674 55
72			
January	334	127	389 15
February	277	94	404 65
March	333	155	500 55
April	425	163	570 30

That during the same period there was sold tickets at the stations named below as follows:

Station.	Amount.	Station.	Amount.
Alvin	29,469 83	McGregor	22,054 85
Bellville	12,540 47	Rogers	20,764 21
Caldwell	20,847 56	Rosenberg	18,750 73
Cameron	41,141 07	Sealy	19,930 75
Clifton	16,729 20	Somerville	21,809 18
Milano	14,818 17	Wallis	9,186 64

—and that the population of said last named places as shown by the United States Census of 1910 was as follows:

Alvin	1453	Bellville	1250
Caldwell	1476	Cameron	3263
Clifton	1137	Milano	500
Morgan	831	McGregor	1864
Rogers	1275	Rosenberg	1198
Sealy	2250	Somerville	2070
Wallis	1000		

That defendant stops its trains Nos. 17 and 18 at those stations named below: At Alvin, Caldwell, Cameron, Clifton, Milano, Morgan, Rosenberg, Sealy, Somerville, Wallis.

Seventh. That since the said 11th. day of March, 1912, and on each day since that date, the defendant has continued to operate said two trains aforesaid, namely, numbers 17 and 18, as aforesaid without stopping said trains at said City of Meridian for the purposes of discharging or receiving passengers at its station in said city of Meridian, except that from the 18th. day of October, 1912,
73 to the 22nd day of November, 1912, inclusive, said trains and each of them were stopped at Meridian as stated in paragraph 4 that said trains have been so stopped.

Eighth. It is further agreed that either the plaintiff or the defendant upon the trial hereof may introduce in the mode provided by law any other or further evidence pertinent to the issues to be decided by the court.

Witness our hands this 20th day of June, A. D. 1913.

B. F. LOONEY,
Attorney General;
LUTHER NICKELS,
Assistant Attorney General,
Attorneys for the State of Texas.
TERRY, CAVIN & MILLS,
A. H. CULWELL,
Attorneys for the G., C. & S. F. R. R. Co., Defendant.

It was admitted by the defendant that the order of the Railroad Commission set out in the Third paragraph of the agreed statement of facts has not been revoked and is still in effect.

Plaintiff Rests.

Defendant's Evidence.

K. S. HULL, for the defendant, testified as follows:

I am Division Superintendent of the Gulf, Colorado & Santa Fe Railway Company, located at Temple. I know what this suit is about. I am familiar with the operation of trains Nos. 17 and 18 between Bellville and Cleburne; that is in my territory.

Train No. 18 originates at Galveston. Regarding its destination, the connection is carried through to Chicago. The train is handled over the lines of the G., C. & S. F. road from Galveston to Purcell, 518 miles. Purcell is located in the State of Oklahoma. The
74 Gulf, Colorado & Santa Fe connects at Purcell with the A., T. & S. F. road, and the A., T. & S. F. handles train No. 18 over its road North of Purcell. I think the same equipment is carried on through from Purcell to the North, except a sleeper that is carried from Galveston to Fort Worth on that train. The equipment of train No. 18 when it starts at Galveston consists of a mail car, first and second-class coaches, and two sleepers; I think that is the regular equipment; Sometimes during the Summer months the train carries three sleepers. The Denver Sleeper they deliver to the Fort Worth & Denver at Fort Worth during the Summer months. Regarding the destination of the sleepers that are regularly carried on that train out of Galveston, one of them is destined to Fort Worth, and the other to Kansas City; I don't know whether the latter sleeper runs through to Chicago or not. So far as I know, the destination of the Chair-car that starts out of Galveston in that train is Kansas City. That train carries through equipment running between Galveston and Kansas City. During the Summer months, say beginning the first of June and up to the first of October of each year, that train carries another sleeper; twice a week it carries a Denver sleeper from Galveston, delivered to the Fort

Worth & Denver Railroad Company at Fort Worth, and I think part of the time during the Summer months a Denver sleeper is carried every day; However, I am not positive of that, but I know we are now carrying the car twice a week. Train no. 18 runs through Somerville and Milano Junction. At Milano Junction it picks up a sleeper and chair-car from the International & Great Northern, those cars originating at San Antonio and destined to Kansas City; We handle those cars over the Santa Fe rails from Milano Junction to Kansas City.

Train No. 17 originates at Chicago; its destination is Galveston.

The Primary purpose intended to be subserved by trains Nos. 17 and 18 was to handle our through inter-state business—through traffic. There is a great deal of competition for that business. The direct competitors of the Gulf, Colorado & Santa Fe road for
75 this through business are the Missouri, Kansas & Texas, the Trinity & Brazos Valley, and the Southern Pacific Lines—the Houston & Texas Central. The business that originates at Galveston, Houston and San Antonio for which the Santa Fe is a competitor is business that can be handled by the other railroads I have named. The principal points in Colorado and California to which this interstate business is generally destined, and which points are reached by the Santa Fe rails, are Denver, Los Angeles and all California points that are reached by the A., T. & S. F.—all New Mexico and Colorado points. The other lines I have named have through service and there is competition between them and the Santa Fe for business destined to Kansas City, Chicago and St. Louis; the other Texas lines have through connection with other lines the same as we have with the A., T. & S. F. There is a through route to those points over the G., C. & S. F. and the A., T. & S. F., over the Trinity & Brazos Valley and its connections, over the H. & T. C. and its connections, and over the I. & G. N. and its connections.

We handle the United States mail on trains Nos. 17 and 18, and there are certain regulations of the Postoffice Department with which we are compelled to comply. I understand that getting the United States mail contracts is competitive business; I suppose it is considered desirable business by the Santa Fe, as they bid for it; it is a matter of service and time. We handle our through mails on trains nos. 17 and 18, and handle through baggage on those trains. We do not carry an express car south of Temple on those trains.

In the agreed statement of facts it appears that there are three trains passing Meridian each way daily, which are named as trains nos. 5 and 6, 11 and 12, and 17 and 18. We now operate eight trains through Meridian daily, four each way; six of those trains, three each way, stop at Meridian. The other two trains that now run through there that were not on at the time the agreed statement of facts was prepared are Nos. 15 and 16. With regard to whether any destination can be reached by the use of trains Nos. 15 and 16 and their connections that can be reached by trains nos. 17 and 18, going north, No. 16 precedes no. 18 to Meridian about

forty minutes, and gets to Cleburne about ten minutes
76 ahead of it; anybody going North could take No. 16 out of Meridian. Going South no. 17 precedes no. 15; therefore passengers would have to take either no. 5 or no. 11. I have a time table showing the time when nos. 15 and 16 are due at Meridian. No. 15 is due there at 11:48 P. M. and no. 16 at 4:52 A. M. They are both night trains through Meridian. No. 17 goes through Meridian at 11:20 P. M. That shows that there is a few minutes difference in the arrival at Meridian of those two night trains, Nos. 15 and 17. Those are southbound trains. No. 15 is scheduled to stop at Meridian. Referring to the North-bound trains, No. 16 is due at Meridian at 4:52 A. M. and No. 18 is due there at 5:25 A. M. No. 16 is scheduled to stop there on flag.

The agreed statement of facts shows that for a period of about thirty days in October and November, 1912, trains Nos. 17 and 18 stopped at Meridian on certain days stated in the agreement. That was done as an experiment. I have here a statement showing the business done by those trains by reason of their stopping at Meridian. This statement is correct, so far as I know. The statement was made up from reports furnished by the conductors; it was made up from special reports. The conductors were furnished with a blank form, a special, mimeographed form, on which to make this report—that is, the conductors of Nos. 17 and 18—showing the number of pasengers that got off and on at Meridian and their destination, etc., and whether they were coach passengers or sleeping car passengers, and this statement is a recapitulation of the business done during the thirty days, prepared from the conductors' reports. The conductors were under my jurisdiction, but they made those reports direct to the Auditor. However, I furnished the reports to them and instructed them. Furthermore, I received copies of the reports they made. This statement was made in my office from copies of the reports filed by the conductors every day at the end of their trip, sent in by mail.

Trains Nos. 17 and 18 both stop at Alvin. There are several reasons why that stop is made; one is that is a water station, and
77 both Nos. 17 and 18 take water there; also, No. 18 picks up No. 5's connection—that is, people from the North going to Houston get on No. 18 at Alvin. There is also quite a lot of travel out of Alvin. Both Nos. 17 and 18 stop at Caldwell; that is another water station, and they stop there for travel. They both stop at Cameron, for the same purpose; they stop there for water. They both stop at Clifton for water. Neither of those trains would stop at Clifton if it were not necessary for them to take water there. Clifton now is the only stop they make on that hundred miles, and that is for water. They stop at Milano; that is for operating purposes, picking up the I. & G. N. cars and setting out connections—the sleeper and chair-car they handle from San Antonio to Kansas City. The North-bound train picks up a chair-car and sleeper at Milano, and the south bound train stops there and delivers the same to the I. & G. N. Both of those trains stop at Rosenberg, for water and for registering purposes, connecting with a foreign line there; at

Rosenberg we take the line of the Southern Pacific into Houston, and it is necessary to stop and register. Both of the trains stop at Sealy; that is for the "Cane Belt" connection. Sealy is a crossing with the M., K. & T.—a junction point of the "Cane Belt" line. There is no interlocker plant at the crossing at Sealy. We have to stop there for the railroad crossing. Both of the trains stop at Somerville; that is for the Beaumont connection, Beaumont division connection making connection with trains Nos. 217 and 218 on the Beaumont division, between Somerville and Beaumont. Those are the two trains that handle business from Beaumont into Somerville, that is going through on those trains. South-bound business going to Beaumont, getting into Somerville on our train No. 17, is delivered to the Beaumont division at Somerville.

The Northern terminus of the Gulf, Colorado & Santa Fe Railway Company is Purcell, Oklahoma.

I do not think trains Nos. 17 and 18 carry the same numbers all the way through to Chicago; I think possibly North of Purcell for a division or two they are numbered 417 and 418, but they are the same trains, the same equipment. When the G. C. & S. F. takes No. 18 into Purcell, the only change that is made before it
78 goes North out of Purcell is to change engines and crews; all the rest of the train goes on through; I do not get up there often now, but they used to pick up a dining-car there. When train No. 17 gets into Purcell and on the rails of the G. C. & S. F., the only change that is made there is to change engines and crews. Both trains Nos. 17 and 18 stop at Temple. No. 17 carries a sleeper from Fort Worth to San Angelo and drops it at Temple, as well as passengers for the San Angelo branch of our road. Train No. 18 also stops at Temple, for the same purposes, and Temple is also a water station. The engines run through from Bellville to Cleburne. Both of these trains Nos. 17 and 18 stop at Cleburne. They change engines and crews at Cleburne and both trains are re-switched there, and we pick up some baggage and express cars on No. 18. I think the distance from Galveston to Gainesville is either 412 or 418 miles. As to whether these trains or either of them carry a sleeper between South Texas points and Dallas, I don't know whether they run any Dallas sleeper now or not; they did so formerly. If they do carry a sleeper between Galveston and Dallas, the sleeper leaves train No. 18 at Cleburne and No. 17 picks it up at Cleburne.

I do not know what population Meridian has. I have not looked at the Census to see its population. However, Meridian is a small town, with a population of about fifteen hundred to two thousand. If the census shows the population of Meridian to be 718, my estimate is a little too high; I thought it was a larger town than that. The depot at Meridian is about a mile and a quarter or a mile and a half from the town. There is nothing much right around or near the depot there except some stock-pens and a cotton platform and one or two small residences. I don't think there is any kind of business concern located any where near the depot there. I will say that it is a mile and a half, at least, from the depot to the court-house. I have been there several times. About one-half or one-third of the

territory between the town and the depot is occupied by residences; the balance of it is in pasture and in cultivation with a few residences scattered along. To some extent the territory between the Santa Fe depot and the town is occupied by agricultural enterprises.

79 Prior to June first this year the G. C. & S. F. did not carry sleepers south of Cleburne on any of its trains except Nos. 17 and 18, on the main line going to Houston and Galveston. Nos. 11 and 12 now carry a sleeper to Waco which they used to drop at Fort Worth; that sleeper is now in the Waco service.

Train No. 5 is shown in the Statement of Facts to be a Southbound train. That train runs between Kansas City and Galveston; it goes to Chicago, too. That train does not carry a sleeper south of Cleburne. The train that runs opposite No. 5 is No. 6; No. 6 is a Galveston and Chicago train; it does not carry any sleeper south of Cleburne, except home-seekers' sleepers, which are all special cars. The next train is No. 11; that train originates at Chicago and Kansas City, and it terminates at Temple. So far as the main line of the Santa Fe is concerned, that train brings the sleeper as far south as Fort Worth, I believe. Train No. 12 which runs opposite No. 11, originates at Temple and goes to Chicago. It does not carry any sleeper out of Temple; I think it picks up a sleeper at Fort Worth, but I am not positive about that; It picks up the H. & T. C. sleeper. The H. & T. C. has no line North of Fort Worth, but it seeks the Colorado Summer business so they carry a Denver sleeper over their own rails out of Galveston to Fort Worth and deliver it to the Santa Fe there. My understanding is that that sleeper is carried out of Fort Worth on our train No. 12.

Trains Nos. 17 and 18 carry sleepers out of and into Galveston and Houston, and they handle San Antonio business, as has been stated. Those are the only trains that carry sleeping-car business South of Cleburne. Sleeping-car business is generally through business.

Cross-examination:

When the Santa Fe built through Meridian I think they bought some land out there about where the depot is situated; I could not say positively as to that, however. I don't know whether they attempted to build a town out there about the depot or not; that was before my time. I never understood from the management that they bought that land for the purpose of moving the town over

80 there. I do not know that Mr. John Sealy is connected with the Sanata Fe Company now; he is not connected with it that I know of, unless he is one of the directors. I think the Sanata Fe owns considerable property over in the neighborhood of the depot at Meridian at this time; I do not know exactly how much it owns there. Outside of the right-of-way, I have no idea as to how much land the company owns at Meridian, because town property is something I don't handle; that is handled by our tax man. I do not know whether it is a fact that the line was not built on the last survey that was run through Meridian or not. I do not know whether

it is a fact that by going nearer to the town we would straighten our line and cut down the grade also or not. The railroad is built up on the side of the hill at Meridian. Of course that is an engineering matter. With regard to its being a matter that a passenger can see from the train window, you can't tell much about running a line of railroad from the windows of a train. With reference to making a curve in the road there in order to get up on the side of the hill and get away from Meridian, there is not very much curvature. There is a curve there in order to get away from the town of Meridian, both North and South of Meridian.

I am familiar with this Texas and Oklahoma Official Railway and Hotel Guide. It is a kind of official organ of the railroads for the use of the public, and it is endorsed by our company. Mr. W. S. Keenan is our General Passenger Agent. This is Mr. Keenan's signature to this paper shown me. Our company furnishes data that is included in these publications. We furnish that data every month; when there are any changes we furnish the publishers a copy of the time card of the changes that have been made, if any. I believe the "Guide" shows Purcell to have about thirty-five hundred people; I suppose that is correct, but I don't know much about Purcell. The population of the towns named in the "Guide" and furnished by our company is supposed to be correct; it is taken from the census. I do not know whether trains Nos. 17 and 18 stop at every town in Oklahoma, regardless of its size, or not. My time-card does
81 not cover Oklahoma; it covers only my territory. Those folders there cover the whole G. C. & S. F. road.

When train No. 18 starts out of Galveston it has five or six cars and two sleepers. The operating division there is from Galveston to Bellville yards. The train does not set out any of the cars at Bellville, nor does it take on any other cars there. That train does not pick up an express car at Temple now; we stopped doing that when we commenced running nos. 15 and 16 through, last Fall. The approximate date when we began the operation of trains nos. 15 and 16 was January 9th last; that was when we put them on the schedule, but prior to that time for three or four months we had been running two sections of Nos. 17 and 18, which performed the same service as now performed by Nos. 15 and 16. The second sections of Nos. 17 and 18 stopped at Meridian. We pick up the San Angelo sleeper at Temple and carry it to Fort Worth on no. 16 now, except when no. 16 is late; in that case, this sleeper goes on no. 18. We hold no. 16 indefinitely for the I. & G. N. connection when they are late at Milano. Before we began the operation of nos. 15 and 16 we carried that sleeper from Temple to Fort Worth on no. 18, and from Fort Worth to Temple on No. 17; we carry it on no. 17 all the time. We set those sleepers out at Fort Worth and pick them up there. We set out the Dallas sleeper at Cleburne, and pick it up there going South. As to whether we set out any thing else at Fort Worth except the San Angelo sleeper, I think we set out the mail car, change the mail car; I think no. 17 picks up the mail car there. I do not think no. 17 picks up a sleeper there that is brought there by no. 11 or no. 12, now; it may pick up a sleeper

that is dropped there by no. 11. No. 11 is not considered a slow train; it is a fast train all the way through. We do not have any slow trains on the main line, but they do not all make as fast time as is made by nos. 17 and 18. Nos. 17 and 18 over some districts on the schedule are faster than any other train on the main line; in my district they are scheduled faster than any other trains we have except on the Houston branch; no. 18 is scheduled at thirty-six miles an hour and no. 17 at thirty-five miles an hour between Temple and Cleburne.

82 It is twenty-four miles from Alvin to Houston. A train leaving Galveston destined to Kansas City makes a trip of about fifty miles out of its way in order to go to Houston, including the return trip; it has to go back to Alvin. We have our own line into Houston. We go over the Southern Pacific from Rosenberg to Houston, thirty-four miles; we do that to avoid backing from Houston to Alvin to get back on our own line. Coming South we take the Southern Pacific at Rosenberg and go to Houston and get on our own line and go to Alvin. Going North we go from Alvin to Houston and out to Rosenberg over the Southern Pacific; it makes an increased mileage of about twelve or fourteen miles.

With regard to the interstate passengers we haul between Kansas City and San Antonio and Galveston, the majority of those want to take a sleeper at Kansas City coming down. They can come down on no. 11 to Fort Worth. Both trains Nos. 11 and 17 handle sleepers. As to whether no. 11 brings a sleeper from Kansas City to Fort Worth and sets it out for no. 17 to pick up, I think that is so, but am not sure. Those arrangements are changed quite often, and they are not handled by me. No. 11 handles the H. & T. C. sleeper. No. 11 is due at Fort Worth at 5:20 P. M. and no. 17 is due there at 8:55 P. M. As to whether an interstate passenger coming down there on no. 11 would have to wait at Fort Worth three hours and twenty-five minutes in order to get to ride on no. 17, that would depend upon how big a hurry he was in; of course if he wanted to ride all the way to Meridian in a Pullman he would have to wait at Fort Worth until no. 17 came along. The H. & T. C. carries a sleeper over its own rails from Houston to Fort Worth, and our train no. 12 carries it on North.

This paper exhibited to me is a pamphlet gotten out by the Gulf, Colorado & Santa Fe.

A Texas man wanting to go from Cleburne or Meridian to Galveston would have to go down to Temple on no. 11 in order to get on the sleeping-car. He would have to wait in Temple from 10 P. M. to 1:05 A. M. No. 11 is due at Temple at 10 P. M., and no. 17 is due there at 1:05 A. M. He could not get to bed until 1:05

83 A. M., and the train would have to be on time for him to go to bed then. A man going from Galveston to Meridian could get a sleeper only as far as Temple on no. 18; he would have to leave the car at Temple at 3:35 A. M. or 3:40 A. M. With regard to whether a citizen of Texas is not entitled to equal service with a man living in Oklahoma and coming through Texas, we have many other towns that are of more importance at which these trains

do not stop. There are a large number of towns other than county seat stations where we do stop, but we stop principally on the ground of revenue and business out of those towns. I rather think if we had more county seats located like Meridian we would not stop trains nos. 17 and 18 at those places. We do stop nos. 17 and 18 at all the county seats in my territory except Meridian. I don't know what they do North of my territory; I don't pay any attention to that; I don't go North of Cleburne. On trains nos. 17 and 18 we carry intrastate passengers between Houston and Galveston; we carry intrastate passengers between Galveston and Alvin, between Alvin and Rosenberg, between Rosenberg and Bellville, between Bellville and Somerville, and between Cleburne and Temple; in fact, we carry a large number of intrastate passengers between each and all of the points where we stop in Texas in the operation of trains Nos. 17 and 18. However I haven't any idea about how many intrastate passengers we carry on those two trains. Our travel depends upon the territory. In short local travel, a man going from Temple to Cameron will take no. 5 and go down in the afternoon, rather than wait at Temple until 1:15 in the morning. It depends upon the district and the time of day a good deal, as well as upon the man's disposition. It does not come within my line to keep up with the relative movements of the traffic. All I want is the revenue from ticket sales at the different stations in my territory. This paper handed me is a statement of the revenue from ticket sales at the different stations; it is correct.

84 I know Mr. Pettibone's signature. This appears to be a letter from Mr. Pettibone to Hon. Jno. L. Wortham, Railroad Commissioner, of date, October 6th, 1911. This is not Mr. Pettimone's signature. It is signed by the Assistant General Manager, Mr. Keefe. There is a "K" under the signature. The letter was written in Mr. Pettibone's office.

I cannot say how much advertisement we did at the time we stopped trains nos. 17 and 18 at Meridian in October and November, 1912, as an experiment; I don't know that we did any. I don't know whether there was any advice given or not in an attempt to let the people of Meridian know that the trains would stop there during that period; I could not say without looking through the files. We had a night clerk there during that period, but I could not call his name off-hand. We did not stop those trains there during that period unless we were flagged or had somebody to let off. I don't think we published in the newspapers at Meridian the fact that we were going to stop those trains there as an experiment; I don't know positively as to that. If we had advertised at Meridian that these trains were going to stop there, I do not think we would have gotten more traffic on them.

I do not know that the company used to carry people from Meridian up to Cleburne on the local train in the afternoon and return free of charge in order to get them to take no. 17 at Cleburne and go to Galveston and South Texas points; it may have been done. I know there have been cases where we have carried passengers on no. 18 to Cleburne and have sent them back on no. 5. Sometimes

trains nos. 17 and 18 have stopped at Meridian when we had passengers for Meridian; that was done upon request on account of sickness or death or something like that. We would not stop those trains there except upon an extraordinary occasion. I will not say that we don't propose to stop those trains there any more in the future unless it is found to be the law that we must stop there. I will not stop nos. 17 and 18 at Meridian unless I am instructed to do so by the management. The management told me we would not stop nos. 17 and 18 at Meridian. The cases where I have stopped those trains there were on my own accord.

The equipment of no. 17 is about the same as that of no.
85 18, except that no. 17 has one more car; the Fort Worth-San Antonio sleeper is carried on no. 17, while on the return it is handled by no. 16 when on time. The heaviest grade is North, too.

Redirect examination:

If there is anybody living at Meridian that wants to go as far away from home as Galveston, I think they would go down in the day time and not at 11 or 12 o'clock at night.

Examination by the Court:

Stopping train No. 18, North-bound, at Meridian, would cause more delay than to no. 17, on account of the grade. We could not stop no. 18 there without ten minutes' delay. As to No. 17 it would not cause so much delay—probably four or five minutes. No. 18 is scheduled at thirty-six miles an hour, and no. 17 at thirty-five. Now we have to run sixty to sixty-five miles an hour to maintain the *the* schedule, upon part of the distance. Upon part of the district they can't make over eighteen to twenty miles an hour, so the average thirty-six miles an hour they have to run at a high rate of speed down grades, and it is hard to make up any time; some times they pick up five minutes; ten minutes is as much as they can make up.

Recross-examination:

The length of time in the average stop would depend entirely on the train. The average stop for no. 18, North bound, in that district would be four to five minutes. With a heavy train you lose much time before you get up speed again. The average stop for no. 17 would be about the same as for no. 18. We necessarily have to maintain our schedule by not stopping at Meridian; that is one of the reasons. The other is that we have all the service needed there for the little business we do; we stop six trains there now.

Examined by the Court:

The trains we stop at Meridian are both night and day trains; we offer facilities of going in and out of Meridian both day and night. Train no. 12 in the morning, gets to Meridian at 8:56 A. M. and a man can go to Fort Worth and Dallas and have three or four hours there and come back on no. 11 at 7:56 P. M. No. 6 North bound, is

due there at 5:30 P. M. No. 5, South bound is due there at
86 10:46 A. M. so we have four day trains and two night trains there now, including nos. 15 and 16.

Recross-examination:

If page 60 of the Texas & Oklahoma Official Railway and Hotel Guide shows that train no. 18 is scheduled to stop at Meridian, that must be a mistake.

The defendant introduced and read in evidence the statement testified to by the witness Hull showing the number of passengers handled to and from Meridian on trains nos. 17 and 18 during the period from October 19th to November 23d, 1912, as follows:

Date.	Train.	No. passengers for Meridian.	No. passengers from Meridian.	No. of sleeping car passengers for Meridian.
10/21	17	2	..	..
10/21	18	1	..	..
10/22	18	1	..	..
10/26	18	1	..	..
10/27	18	1	..	..
10/29	18	2	..	2
10/30	18	..	1	..
11/ 1	17	1	2	..
11/ 3	18	4	1	..
11/ 4	17	2	2	..
11/ 5	18	1	1	..
11/ 5	17	..	1	..
11/ 6	18	1	1	..
11/ 7	17	1	..	..
11/ 7	18	1	..	..
11/ 8	17	1	..	..
11/ 8	18	..	1	..
11/ 9	18	1	..	..
11/10	18	1	..	..
11/11	18	1	..	..
87				
11/11	17	3	..	..
11/11	17	3	..	..
11/15	18	1	..	..
11/16	18	2	..	..
11/17	18	..	2	..
11/21	18	..	1	..
11/22	17	5	..	..
11/22	18	..	2	..
11/ 2	17	..	4	..
11/ 2	18	1	..	..
11/22	2/18	..	1	..
11/22	2/17	2	1	..
Total		37	21	2

Temple, Texas, December 10th, 1912. L.

The defendant next introduced and read in evidence statement contained in the Texas and Oklahoma Official Railway and Hotel Guide for August, 1912, showing that the population of Meridian is 718.

The defendant next introduced and read in evidence statement of the passenger business for twelve months at the stations named therein, as follows:—

Passenger Business for Twelve Months Ending May, 1913.

Month.	Moody.	McGregor.	Valley Mills.	Meridian.	Clifton.
June, 1912.....	1,446.55	2,194.75	867.80	747.67	1,441.59
July, "	2,181.75	3,382.80	1,332.30	1,059.45	2,278.96
Aug. "	2,209.50	4,368.90	1,495.15	1,331.45	2,743.66
Sept. "	2,144.95	2,693.80	1,164.45	913.10	1,955.23
Oct. "	3,965.00	4,444.85	1,357.64	1,121.65	2,352.85
Nov. "	2,598.60	3,463.05	1,254.08	1,445.10	2,449.92
Dec. "	2,197.40	3,474.45	1,917.80	875.10	1,775.55
88					
Jan. 1913.....	1,306.95	1,865.55	789.15	768.25	1,248.01
Feb. "	1,115.10	1,768.60	683.50	724.15	1,424.95
Mar. "	1,322.95	1,790.60	951.15	763.85	1,879.14
Apr. "	1,122.40	1,932.25	781.50	775.75	1,339.14
May "	1,589.78	2,453.90	1,024.90	780.85	1,589.62
Total....	23,290.93	33,832.90	12,719.42	11,306.37	22,478.62

Defendant Rests.

Plaintiff's Rebuttal.

The plaintiff introduced and read in evidence page 60 of the Texas and Oklahoma Official Railway and Hotel Guide, dated January, 1911, as follows:

Gulf, Colorado & Santa Fe Ry.—Con'd.

Temple and Purcell.

Read down.							Read up.			
No. 18, daily.	No. 12, daily.	No. 16, daily.	No. 6, daily.	Miles.	Stations, December 4, 1910, Wells Fargo Exp.	Population.	No. 5, daily.	No. 17, daily.	No. 11, daily.	No. 15, daily.
A. M.	A. M.	A. M.	P. M.				P. M.	A. M.	P. M.	A. M.
3 35	....	2 45	3 20	218.8	....Lv. Temple Ar....	10,993	2 15	1 10	....	2 03
....	....	....	3 32	225.9	.....Pendleton	225	2 00	....	....	1 45
....	....	3 13	3 50	234.0	.....Moody	1,104	1 40	....	....	1 30
....	....	3 30	4 10	243.9	.....McGregor	2,500	1 18	....	....	1 10
....	....	3 43	4 25	250.6	.....Crawford	800	12 58	....	....	12 52
....	....	4 01	4 43	259.9	.....Valley Mills...	519	12 40	....	....	12 33
....	....	4 22	5 08	271.0	.....Clifton	1,478	12 20	....	....	12 12
....	....	4 39	5 25	281.2	.....Meridian	1,000	11 56	....	....	11 48
....	....	4 59	5 47	288.8	.....Morgan	1,500	11 37	....	....	11 32
....	....	5 11	6 02	295.5	.....Kopperl	329	11 21	....	....	11 12
....	....	5 27	6 17	303.6	.....Blum	354	11 07	....	....	10 58
....	....	5 40	6 29	310.1	.....Rio Vista	600	10 55	....	....	10 45
6 10	....	6 00	6 45	318.0	....Ar. Cleburne Lv...	1,200	10 40	10 15	....	10 30
6 45	9 20	....	7 10	318.0	....Lv. Cleburne Ar. ..	1,200	10 30	9 50	6 50	
....	9 40	....	7 24	325.8	.....Joshua	800	10 15	....	6 33	
....	10 00	....	7 40	334.2	.....Crowley	100	10 00	....	6 16	
7 45	10 30	....	8 15	346.1	....Ar. Ft. Worth Lv..	73,312	9 30	8 45	5 45	
8 00	10 45	....	8 30	346.1	....Lv. Ft. Worth Ar..	73,312	9 15	8 30	5 30	
....	11 07	....	8 51	354.4	.....Saginaw	75	8 55	....	5 05	
....	11 22	....	9 07	362.5	.....Haslet	30	8 37	....	4 47	

....	11 37	....	9 23	371.1	.....Justin	800	8 19	....	4 30	
....	11 46	....	9 35	377.8	.....Ponder	109	8 04	....	4 16	
....	11 57	....	9 45	384.1	.....Krum	425	7 54	....	4 03	
....	12 11	....	10 01	392.7	.....Sanger	1,500	7 38	....	3 44	
....	12 25	....	10 17	401.3	....Valley View	750	7 23	....	3 25	
9 55	12 50	....	10.40	411.3	....Ar. Gainesville Lv..	10,000	7 00	6 15	3 05	
10 00	1 10	....	10.45	411.3	....Lv. Gainesville Ar..	10,000	6 40	5 50	2 45	
10 27	1 36	....	11 12	423.6	.....Thackerville ..	154	6 07	5 22	2 15	
10 48	1 55	....	11 32	433.7	.....Marietta	1,391	5 45	5 00	1 55	
11 06	2 20	....	11 49	443.4	.....Overbrook	118	5 28	4 40	1 30	
11 22	2 40	....	12 07	451.0	.....Ardmore	8,618	5 10	4 25	1 15	
11 45	3 00	....	12 27	460.9	.....Berwyn	378	4 45	3 58	12 52	
12 12	3 31	....	12 54	470.1	.....Dougherty	276	4 19	3 31	12 30	
12 32	3 54	....	1 18	478.4	.....Davis	1,340	3 57	3 07	12 05	
1 01	4 16	....	1 40	488.6	.....Wynnewood ...	2,032	3 37	2 50	11 40	
1 18	4 37	....	2 02	496.1	.....Paul's Valley...	2,157	3 20	2 33	11 20	
1 38	4 58	....	2 25	503.2	.....Paoli	229	3 02	2 18	11 05	
2 03	5 15	....	2 48	510.8	.....Wayne	198	2 48	2 03	10 50	
2 15	5 35	....	3 00	518.0	....Ar. Purcell Lv.....	3,500	2 30	1 45	10 30	
7 00	....	....	6 55		....Ar. Kansas City Lv.	248,381	9 40	10 05	....	
9 30	....	....	9 15		....Ar. Chicago Lv.....	2,185,283	6 00	9 30	....	
P. M.	P. M.	A. M.	A. M.				P. M.	A. M.	A. M.	P. M.

The plaintiff next introduced and read in evidence page 60 of the Texas and Oklahoma Official Railway and Hotel Guide, dated September, 1912, as follows:

Gulf, Colorado & Santa Fe Ry.—Con'd.

Temple and Purcell.

Read down. No. 18, daily.	Read down. No. 12, daily.	Read down. No. 6, daily.	Miles.	Stations, Aug. 18, 1912, (Wells, Fargo Exp.).	Population.	Read up. No. 5, daily.	Read up. No. 17, daily.	Read up. No. 11, daily.
A. M.	A. M.	P. M.				P. M.	A. M.	P. M.
4 00	7 00	3 30	218.8	....Lv. Temple Ar.....	10,993	12 45	1 05	10 00
....	7 15	3 40	225.9	.....Pendleton	250	12 31	....	9 45
....	7 31	3 53	234.0	.....Moody	983	12 16	....	9 30
....	7 50	4 10	243.9	....Ar. McGregor Lv.....	1,864	11 55	....	9 10
....	8 45	....	263.2	....Ar. Waco Lv.....	26,425	....	....	8 15
....	7 00	....	263.2	....Lv. Waco Ar.....	26,425	....	....	10 00
....	7 50	4 10	243.9	....Lv. McGregor Ar.....	1,864	11 55	....	9 10
....	8 03	4 25	250.6	.....Crawford	516	11 38	....	8 54
....	8 20	4 43	259.9	.....Valley Mills	708	11 17	....	8 36
5 28	8 45	5 08	271.0	.....Clifton	1,137	10 56	11 36	8 17
5 44	9 03	5 25	281.2	.....Meridian	718	10 33	....	7 56
....	9 18	5 47	288.3	.....Morgan	831	10 16	11 05	7 41
....	9 32	6 02	295.5	.....Kopperl	350	10 01	....	7 26
....	9.47	6 17	303.6	.....Blum	675	9 47	....	7 12
....	9.59	6 29	310.1	.....Rio Vista	600	9 30	....	7 00
6 50	10 15	6.45	318.0	....Ar. Cleburne Lv.....	10,364	9 15	10 15	6 45
7 15	10 25	7 10	318.0	....Lv. Cleburne Ar.....	10,364	8 50	9 50	6 20
....	10.39	7.24	325.8	.....Joshua	750	8 34	....	6 04

....	10 53	7 38	334.2	.....Crowley	100	8 17	....	5 47
8 10	11 20	8 05	346.1	....Ar. Ft. Worth Lv.....	73,312	7 45	8 55	5 20
8 25	11 30	8 20	346.1	....Lv. Ft. Worth Ar.....	73,312	7 30	8 40	5 05
....	11 52	8 42	354.4	.....Saginaw	120	7 10	....	4 40
....	12 07	8 59	362.5	.....Haslet	60	6 53	....	4 25
....	12 22	9 15	371.1	.....Justin	700	6 38	....	4 10
....	12 33	9 29	377.8	.....Ponder	130	6 24	....	3 56
....	12 44	9 41	384.1	.....Krum	525	6 14	....	3 46
....	1 00	10 00	392.	.....Sanger	1,013	6 00	....	3 31
....	1 16	10 17	401.3	.....Valley View	824	5 46	6 39	3 14
10 20	1 35	10.40	411.3	....Ar. Gainesville Lv.....	7,624	5 30	6 20	2 55
10 25	1 55	10.45	411.3	....Ar. Gainesville Lv.....	7,624	5 25	5 55	2 35
10 53	2 24	11 18	423.6	.....Thackerville	154	4 53	5 25	2 00
11 14	2 42	11 40	433.7	.....Marietta	1,546	4 38	5.04	1 40
11 30	2 58	11 57	443.4	.....Overbrook	118	4 17	4 45	1 19
11 47	3 16	12 16	451.0	.....Ardmore	8,618	4 02	4 31	1 03
12 06	3 34	12 36	460.9	.....Berwyn	378	3 41	4 06	12 38
12 28	3 56	12 57	470.1	.....Dougherty	278	3 23	3 35	12 10
12 47	4 15	1 20	478.4	.....Davis	1,416	3 06	3 09	11 50
1 08	4 29	1 43	488.6	.....Wynnewood	2,002	2 49	2 50	11 28
1 22	4 44	2 02	496.1	.....Paul's Valley	2,689	2 35	2 33	11 15
1 40	5 02	2 22	508.2	.....Paoli	239	2 22	2 18	11 01
2 03	5 17	2 45	510.8	.....Wayne	332	2 06	2 03	10 46
2 15	5 35	3 00	518.0	....Ar. Purcell Lv.....	2,740	1 50	1 45	10 30
7 00	7 10	6 55		....Ar. Kansas City L.....	248,381	9 40	10 00	9 25
9 15	9 15	9 15		....Ar. Chicago Lv.....	2,185,283	6 00	9 30	9 30
P. M.	P. M.	A. M.				P. M.	A. M.	A. M.

91 The plaintiff next introduced and read in evidence the following extracts from Local Time Card issued by the Gulf, Colorado & Santa Fe Railway Company, in effect December 10, 1912:

Train No. 17.

Drawing Room Sleeper Kansas City to San Antonio, via Purcell, Milano, I. & G. N., and Austin (Train 11 to Fort Worth). Dallas to San Antonio, via Milano and I. & G. N. Dallas to Galveston, via Houston (Train 68 to Cleburne). Kansas City to Galveston, via Purcell, Ft. Worth and Houston. Fourteen Section Smoking Room Sleeper Ft. Worth to San Angelo (Train 77 from Temple).

92 Train No. 18.

Drawing Room Sleeper Galveston to Kansas City, via Houston, Ft. Worth and Purcell. Galveston to Dallas, via Houston (Train 67 from Cleburne). San Antonio to Kansas City, via I. & G. N., Austin, Milano, Ft. Worth and Purcell (Train 12 North of Ft. Worth). San Antonio to Dallas Via I. & G. N., Austin and Milano (Train 67 from Cleburne). Fourteen Section Smoking Room Sleeper, San Angelo to Ft. Worth (Train 78 to Temple.)

The plaintiff next introduced and read in evidence the following extracts from the time-card of the Atchison, Topeka & Santa Fe Railway System and connecting lines, corrected to December 8, 1912 (Trains nos. 17 and 18 involved in this case being referred to therein as nos. 9-17 and 18-8.):

No. 9-17—Daily (Texas Fast Mail).

Pullman Drawing Room Sleepers, Chicago to Kansas City; Kansas City to Galveston.

Pullman Drawing Room Sleeper, Topeka to Newton (from St. Joseph on No. 107 to Wichita on no. 117).

Pullman Drawing Room Sleeper, Cleburne to Houston and Galveston (from Dallas on No. 68); Ft. Worth to Milano (for San Antonio from Kansas City on no. 11).

Pullman 14—section standard sleeper, Ft. Worth to Temple (for San Angelo). Pullman 16 section standard sleeper, Kansas City to (*) Wichita.

Tourist Sleeper, Chicago to Kansas City.

Chair-car, Chicago to Kansas City; Kansas City to Milano (for San Antonio); Newton to Galveston. Cafe-Observation car, Chicago to Kansas City.

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*Passengers may occupy sleeper until 7.00 a. m.

No. 18-8—Daily (Kansas City and Chicago Fast Mail).

Pullman Drawing Room Sleeper, Galveston to Kansas City; Galveston and Houston to Cleburne (for Dallas on no. 67); City of Mexico to San Antonio; Milano to Ft. Worth (from San Antonio for Kansas City on no. 412-12); Newton to Topeka (from Wichita for St. Joseph); Kansas City to Chicago.

93 Pullman 14—Section standard sleeper, Temple to Ft. Worth (from San Angelo).

Pullman 16—section standard sleeper, Wichita to Kansas City. Chair car, Galveston to Newton; City of Mexico to San Antonio; Milano to Kansas City (from San Antonio); Kansas City to Chicago. Cafe-observation car, Kansas City to Chicago.

GEORGE P. ROBERTSON, for the plaintiff, testified as follows:

I live in Meridian, Texas. I am a lawyer by profession. I have lived in Meridian thirty-three years, and am pretty well acquainted with the people of Meridian. I would say that the population of Meridian is about 1500 at this time.

I frequently have occasion to travel out of Meridian on the Gulf, Colorado & Santa Fe Railway. I have occasion to make trips to Galveston. When I want to go from Meridian to Galveston I want a sleeper; I want as good accommodations as they have. The best way the people of Meridian have to go South, and the way I go, is to go to Waco and there take the Houston & Texas Central; that is the best route. I can go to Waco and get a sleeper there at 10 o'clock on the H. & T. C. and go through, and it is no trouble to go from Houston to Galveston any time of the day. To get a sleeper on the Santa Fe to Galveston, I have not tried it lately, but the only way I know of would be to go from Meridian to Temple and wait there for no. 17. In coming to Austin on this trip I left Meridian at 7:56 P. M., yesterday evening, and went to Waco, reaching there at 10 o'clock, and took a sleeper on the M. K. & T. leaving Waco at 11:20 P. M. The fare from Meridian to Austin over the Santa Fe is $4.00, while the fare from Meridian by way of Waco and the M. K. & T. to Austin is $4.85. If I could get the same accommodations on the Santa Fe as I do by way of Waco and the M. K. & T., I would come to Austin over the Santa Fe in preference to the other route. If I leave Meridian at 7:56 P. M. and go to Temple I have to wait there for no. 17 on the Santa Fe or wait to catch a "Katy" train through there. Sometimes I come to Austin pretty often, and some times not so frequently. I know of a good many people that make trips to Austin from Meridian. As to how often I go to Galveston, I have

94 been averaging about two trips a month. I know of other people that make the trip from Meridian to Galveston and return. Within my knowledge some of the citizens of Meridian make trips out of the State; I guess the number that make such trips would be about in proportion to the size of the town.

I know how trains nos. 15 and 16 operate through Meridian. Ever since trains nos. 17 and 18 were put on until some time early last year, they had this rule, as I understood from what Mr. Keenan

told me, and I found it worked: If I wanted to go South to Austin, San Antonio, Houston or Galveston, I would go over to the depot in time for the 5:25 P. M. train and buy a ticket to the point where I wanted to go, and that ticket carried me to Cleburne and there I would get on the South-bound train and go on. I used to travel that way a good deal. That arrangement is not in effect now, however. In order to catch no. 17 at Cleburne in the manner stated, I would have to leave home at 5:25 P. M., whereas if train no. 17 stopped at Meridian I could catch it at 11:40 P. M. Going home on the return trip, if no. 18 stopped at Meridian I could get there at 5:20 A. M., or something like that; whereas by stopping at Temple or Cleburne and taking the other train I get to Meridian at 8:56 A. M.

People frequently go across the country from Meridian to Clifton in order to catch these fast trains, nos. 17 and 18. It is thirteen miles by the dirt road from Meridian to Clifton; it is called twelve miles, but it registers thirteen. I have known of people destined for Meridian that would get off of these fast trains at Clifton and drive across to Meridian; I don't know that I could give the number that do that, but it happens pretty often. In coming from Meridian to Austin on the slow trains you have to lay over to make connections with the other roads, while the fast trains, nos. 17 and 18, make direct connections.

I have traveled North out of Meridian a good deal. No. 16 stops at Meridian when flagged and you can go to Cleburne on it, and there you have your choice of going on it or on no. 18. I think trains nos. 15 and 16 have been running since the first of this year.

We have a college located at Meridian. As to the average attendance at that college, that would be guess-work on my part. I
95 have seen the student body and observed them, and I would say that the average attendance is about two hundred. I would say that about one-third of the students are residents of Meridian, and about two-thirds are non-residents. As to how the non-resident students travel into and out of Meridian in coming to and leaving school, I believe about all of them come down the Santa Fe and then go out the Cotton Belt to McGregor; there are very few that do not go out that route.

With regard to the stopping of trains nos. 17 and 18 at Meridian on certain days in October and November, 1912, I did not know that those trains were stopping there during that time. On the first day of November I tried to leave Meridian on one of those trains, and could not, and tried to come back on one of them and could not. I left Meridian on the first day of November, and reached home on the morning of the 6th; I was in Houston on the 5th and went to Galveston. I wanted to come back home from Galveston on the 5th, and tried to get passage on no. 18. I tried to get passage on the fast trains both ways. When I left Meridian, I asked the agent, Mr. De Spain, about it; he lives right near me. I asked him if there was any chance to go South on that train, no. 17, and he said "No" I could not. While in Galveston on that trip I tried to get a ticket, and the agent told me, "You can't go on that train—I Can't sell you a ticket for that train." The Up-

town office in Galveston is where I tried to get the ticket; that was a ticket office of the Santa Fe. I have made inquiry among the citizens of Meridian to ascertain what per cent of them have learned the fact that trains nos. 17 and 18 were stopping there during the months of October and November, 1912. My investigation of that matter was pretty thorough. I did not find any one that knew it. I am pretty sure that the Railway company did not have an agent at the depot in the night time during that period. It occurs to me that there was but one man there at the depot from about the first of October until about Christmas; there was quite a space of time when there was only one man there.

I know of some parties from Meridian that had been to Beaumont and wanted to return home and had passage on these fast trains on the Santa Fe; they had to get off the train at Clifton; that was Mr. Standifer and his wife. That was about the 28th. of No-
96 vember or first of December, last year. I saw the tickets they had; I have the tickets at home now. Their tickets read to Meridian. The fare from Meridian to Cleburne is $1.10.

Cross-examination:

I expect I travel more than any body else in Meridian—That is, I have done so for the last ten or fifteen years, but have not traveled so much during the last year. The most of my traveling is not to Austin. I go down to Galveston more than I do any where else. I want to travel where they have the most accommodations on the route. With regard to which I regard as the greater accommodation, to go over a route where I can go to bed at 10 o'clock or to go over a route where I could not go to bed before 12:30 o'clock, that would depend upon whether the point I am starting from is at home or away from home; if it is at home, I would prefer to stay at home as long as I can. If I am going from home on a trip I would rather sit up at home until 12 o'clock and then catch the train than to go some where else and catch the train at 10 o'clock; that gives me all the sleep I care for, anyway, if I get to bed at 12 o'clock. However, I believe the average person would prefer the accommodation which allows him to go to bed at 10 o'clock to one that requires him to sit up until 12:30 to get to bed. If train no. 17 were to stop at Meridian and I wanted to go to Galveston on it I could not possibly get to bed until its arrival, which is about 12:30 A. M. I can go to Waco, however, and take the "Katy" or the H. & T. C. or the I. & G. N. and take a sleeper; the H. & T. C. leaves at 10 o'clock; the "Katy" leaves at 11:20 P. M., but I don't know what time the I. & G. N. leaves, as I never did go on it. I do not think it would be a better accommodation to go to Waco and take a train there even if no. 17 stopped at Meridian. I do not say that just because I like to sit up late at night; there is another condition in it, which is that the Santa Fe equipment is better. The Santa Fe has the best equipment in the State, in my judgment, and I have been on all the railroads. I do not think it is a fact that you can reach any destination by using trains nos.

15 and 16 and their connections that you can reach by using
97 nos. 17 and 18 and their connections; there is a difference in coming from Meridian to Austin. I do not know that the people of Meridian are kicking about not having a railroad into Austin. I do not know about the connections South; when I go South I do not make connections at Brenham, because I usually go out of Houston. Going North, no. 16 gets to Meridian some twenty or twenty-five minutes ahead of No. 18, and it gets into Cleburne ahead of No. 18, and at Cleburne a man has his choice; if he wants to get on No. 18 he can do so. Coming South, No. 15 passes Meridian within an hour of No. 17. No. 15 goes to Galveston, but you don't make the same connection going into Houston—at least, I never did; I have had to wait at Alvin some fifty or sixty minutes. With regard to coming to Austin from Meridian, of course Austin is not on the line of the Santa Fe, but we call it the Santa Fe because you don't have to change cars. I think the Santa Fe handles trains through Austin, because they advertise that they run trains from San Antonio, through service. I can get in a Santa Fe car at Meridian and ride in that car clear to San Antonio. I never did go to Kansas City, but understand that the cars that pass through Meridian go to Kansas City. Of course, Austin is not located on the line of the G. C. & S. F. Railway.

I mentioned some people that had to go through Meridian to Clifton on the fast train and double back to Meridian. I can't say whether that is part of the service or not. Moody is a good sized town. My understanding is that trains nos. 17 and 18 do not stop at Moody, nor at McGregor. The conditions that apply at Meridian with regard to these two trains also apply at Moody, McGregor, Crawford and Valley Mills. I suppose a train that stops at every station would be termed a local train. I think it is true that nearly all of the trunk lines maintain certain trains which are called through trains, but my experience has been that they will flag those trains for passengers. I do not know that the H. & T. C. has a train that leaves Houston at midnight for Dallas and does not make any local stops at all; I have not been on it. I know that the M. K. & T. maintains a train called the "Katy Limited", which does not stop at all stations, but they will flag it for passengers.

I can't say that they will flag that train at any station or
98 every station; the only experience I have had with it has been at two places, at Lorena and at Leonard. It is — fact that the M. K. & T., the Santa Fe, the H. & T. C. and the T. & B. V. are competitors; they all originate in Galveston and Houston and run to Dallas and Fort Worth, and they are competitors for business to points outside of Texas—that is, where they go to the same places. It is my theory, and I believe it is the way people generally look at it, that if a bunch of us wanted to go to Kansas City and we would talk about it, and I say, "Boys, the best equipment is on this road and it is only a hundred miles farther," we would go that way. The railroad that can furnish to the passenger the best accommodations, route, and service generally gets the business, and I think it ought to.

With reference to the college located at Meridian, it is a Methodist

college or training school. Probably two-thirds of the pupils come there from Hamilton and Coryell counties, and in going home they go out the Cotton Belt. I do not think it is any inconvenience to those pupils because trains nos. 17 and 18 do not stop at Meridian. My understanding is that the trains on the Santa Fe and on the Cotton Belt do not make connection at McGregor. It may be that I am in error about that. Whenever I have to go to Hamilton or Coryell County I go through in an automobile. Neither No. 17 nor No. 18 is scheduled to stop at McGregor. I did not know that trains nos. 5 and 6 on the Santa Fe make close connection at McGregor for Waco.

My estimate is that we have 1500 people in Meridian. The travel in and out of Meridian is not altogether local business. I think there is more travel in and out of Meridian than is the case of the average town of its size. Being the county seat, there is naturally more travel. I believe the travel at Meridian is larger than at Clifton. I have not seen a statement of the receipts of the company at Meridian and at Clifton. I do not know as a matter of fact that the receipts at Meridian are about half as large as the receipts at Clifton. My statement was based upon the population. Valley Mills is a smaller place than Meridian. So far as I know, trains nos. 17 and 18 do not stop at Valley Mills. As to whether
99 I know that for the year ending May, 1913, the business at Valley Mills was better than at Meridian, I could not give you an estimate on that business, because that is something I have nothing in the world to do with. As to the passenger traffic at Clifton on Nos. 17 and 18, a large part of it properly belongs to Meridian, because it is carried back and forth by automobiles in order to use those trains. If the data shows that the passenger receipts at Meridian for the twelve months ending with May, 1913, were $11,306.37 I think that looks pretty good. McGregor is larger than Meridian. I have never been to Moody, other than going through there, but I believe we have a larger population in Meridian than Moody has. My judgment is that it is not fair to compare Meridian with Clifton, because Clifton has the greater facilities. Meridian has equal facilities with Moody, Valley Mills and McGregor, so far as trains nos. 17 and 18 are concerned.

Redirect examination:

The depot at Meridian is in the corporation limits, but it is a mile and a quarter from the court-house.

When I leave Austin to return to Meridian, if I go in the daytime I can leave here on the I. & G. N. and Santa Fe at 10:20 A. M., I believe it is. If I want to make a night trip, the only way to get a sleeper is to take the sleeper here and go to Waco and take the 7 o'clock Santa Fe train in the morning. The train from Austin gets to Waco about 3 or 4 o'clock in the morning.

Miss IDA ODLE, for the plaintiff, testified as follows:

My home is in Meridian; I am in Austin only temporarily. I have had occasion to travel into Meridian on what is known as

the South-bound fast train on the Santa Fe; that was on the 11th. of last July. On that trip I started from Frost. I bought a ticket straight through. I caught the train at Cleburne, but they did not let me off at Meridian; I left the train at Clifton. I asked them to let me off at Meridian. I had to pay my fare from Meridian to Clifton and back. With reference to what time I passed through Meridian, the train was late. When I got into Meridian it must have been about 3 o'clock; it must have been 3:30 o'clock when I passed through Meridian, because it was 4 o'clock when I got to Clifton. I got to Meridian something after 7 o'clock.

Cross-examination:

I bought a ticket from Frost to Meridian. Frost is on the H. & T. C., on the branch out from Corsicana. I believe Frost is on the Cotton Belt. The Cotton Belt sold me a ticket from Frost to Meridian, and when I struck the line of the Santa Fe I got on the fast train and they carried me to Clifton; they would not stop for me at Meridian under any consideration.

D. J. CUTBIRTH, for the plaintiff, testified as follows:

I live at Meridian, Texas. I am County Clerk of Bosque County, and have held that office since the 4th. of December, 1902. I went to Meridian on the 3rd. of December, 1902, and have lived there since.

I have had occasion to take passage on the Santa Fe trains Nos. 17 and 18, at different times. Since this suit started the company has put on two more trains. At the present time, in order to get the benefit of a sleeper you have to take another train and run up the road or down the road and wait for the fast train, which carries the sleeping-car. You can take the train at Meridian at 7:56 in the evening and go to Clifton and wait there until 11:50 P. M. and catch the sleeper. We don't use any sleeper going North, because it goes through our town in the day time. If you want to catch the South-bound train North of Meridian you have to go to Cleburne. At the time this suit began, Nos. 15 and 16 were not running, and Nos. 17 and 18 both stopped at Morgan. Morgan is not a county seat town, but they stopped both trains there. People living in Meridian go to Morgan and to Clifton to catch these fast trains; I think I know that better than any body else, because I own an automobile, and being a public man, when my friends want to go to either place they call on me, and I take them. I have taken many people to those places. As long as they stopped the trains at Morgan, we went there. It is seven miles and a half from Meridian to Morgan. It is about twelve miles from Meridian to Clifton. Last Monday night I took a party to Clifton to catch the sleeper into Austin.

If you want to go to Dallas, and leave Meridian on the 8:56 A. M. train and come back on the 7:56 train, you have very little time in Dallas. I have gone up there on that trip and stayed over for the reason that I didn't have time to transact the business I wanted to,

and could not go back on No. 17, because they would not stop at Meridian. Leaving Meridian at 8:56 A. M., I think you get into Dallas about 1 P. M., and you have to leave there about 4 o'clock in order to get to Meridian at 7:56 P. M. Using the fast train, you could get into Dallas about 9 A. M. and leave there about 7 P. M., giving you all day in Dallas. Fort Worth is a little nearer to Meridian, and the conditions are a little different, but not much.

A number of times I have gone to Clifton and to Morgan to get people who had come in on those fast trains. Some time last winter, in January or February, Mr. Odle and Mr. Edwards and others had been down to South-West Texas and they came in from San Antonio; they had tickets to Meridian, but they took them to Clifton, and they phoned to me and I went after them.

During the time the company pretended to stop these trains at Meridian I asked the agent, Mr. De Spain, if those trains were stopping there, and he said they were not. I said, "Well, Mr. Lomax told me they were stopping," and he said, "Well I have nothing for it." Mr. Lomax was a hack-driver there. I was at the station when those trains passed during that period of time, and they did not stop; they went through there faster than any other part of the line from Cleburne to Temple; They do down the grade about sixty miles an hour. I have not made any particular investigation among the citizens of Meridian to ascertain what per cent of them had learned that those trains were supposed to stop at Meridian, but I found only one man that knew any thing about it, and that was Mr. Lomax, who drives the transfer. He told me he thought they were to stop there, and I asked the station man, and he told me "No", and I told him that Mr. Lomax told me, and he said, "Well, I have nothing on it—I have never been notified." I heard afterwards that they had been stopping these trains, but I cannot testify
102 whether they actually stopped or not.

The addition of trains Nos. 15 and 16 has altered the conditions, so far as the local travel is concerned, but those trains do not help us so far as sleeping-car service is concerned; of course, we can sit up all night on those trains and go to any point we want to. When you catch a slow train and go to Clifton to catch a fast train I do not think they haul you there free. I have not ridden on the slow train over there to catch a fast train, because I run my automobile, but I have been told by several that they had to pay to go over there. Three or four years ago I went to Cleburne one time and doubled back, and they didn't charge me. I have never ridden on a pass on the Santa Fe road, and I have done more for the Santa Fe people than any other man in the town. Whenever any body in Galveston wants any thing they write to me and get it. Personally it don't make any difference to me; I am just giving the facts as they exist.

Cross-examination.

I do not know that the fact that these trains do not stop at Meridian is really a benefit to me in the way of giving me an opportunity to

accommodate my friends and make votes to keep myself in office. I don't think it is worth five cents to me, because it is always my friends that ask me to do these things for them, and they will stay with me anyhow.

In order to maintain a fast train schedule and through service, I presume it is necessary that somebody somewhere must be discommoded to some extent. Of course, you could not have a fast train and have it make every local stop; but you can have a fast train and stop it at Meridian if you can stop it at every other county seat in Texas. I suppose it is true that Meridian is the smallest town for a county seat of any town located on the Santa Fe Railroad. Meridian has had its drawbacks, of course.

It is agreed that the plaintiff should read the written statement of the witness A. O. Watson, subject to objections by the de-
103 fendant the same as if the witness were upon the witness-stand, said statement being as follows:

MERIDIAN, TEXAS, April 12, 1912.

Statement of A. O. Watson.

My name is A. O. Watson. I live at Austin and am an Architect. I am here for the purpose of appearing before the school board with reference to the school building to be built here. I bought a ticket from Austin to Meridian via Milano Junction, and was notified by the conductor on the train that the train would not stop at Meridian. I told him that I had important business here and wanted to meet with the schoolboard on the morning of the 12th., and that I wanted to meet with the board and catch the first train out of Meridian North. The conductor said that the train did not stop at Meridian, that it was almost impossible on account of the heavy grade at Meridian for the train to stop there. He said that it would be better for me to stop at Temple. I bought this ticket on April 9th. from the I. & G. N. The conductor said that if I demanded that he stop the train that he would stop it at Meridian, but that it was about a mile and a half from the depot to town and that I would have to walk to town as there would not be a bus to meet that train. I told him that I would stop anyway, that I wanted to stop off and see the school board and catch the first train out of Dallas. I got off at Meridian and after transacting the business with the school board that I came to see about, went on to Dallas. Yesterday morning while in Dallas at the warehouse of the Regal Motor Car Company one of the representatives of the company went to the phone and called up the Santa Fe office and asked them when the next train would leave for Meridian, and they said it would leave at 7:45 that evening. Afterwards I went up to my room at the Campbell House to look over some matters, and had the clerk of the hotel telephone down to the Santa Fe office and ask them when the first train would leave for Meridian, and he said at 7:45 that evening. I went down to the ticket office last night to buy a ticket and as I came up to the

ticket office Mr. Wolff was walking away. He asked me
104 which way I was going and I told him to Meridian. He said they would not sell me a ticket, and I told him I thought they would. I told the agent I wanted a ticket to Meridian, and he said he could not sell it to me. I took out one of my business cards and wrote on the back of it a demand that they sell me a ticket to Meridian, and he said that he would do it, but that he would mark on the back of it not good on No. 17. He then sold me ticket No. 8934, form 103. Mr. Wolff and myself then got on the train. When the conductor came through and saw the ticket that I had and the one Mr. Wolff had, he said that these tickets were nor good on this train, that we would have to stop at Cleburne and get out on the morning train. I told him that they would have to let me off at Meridian, and he said that they would not stop the train. When we got off at Cleburne the depot master came out and had a talk with Mr. Wolff about the ticket, and wanted to see Mr. Wolff's ticket. Mr. Wolff finally handed him the ticket to look at. The depot master then wrote something on a piece of paper, I presume the number of the ticket, and handed it back to Mr. Wolff. I told the depot man that the law required them to stop this train at Meridian. That an order had been made that this train must stop at Meridian after April 2nd, 1912, and I demanded that the train be stopped to let me off. The conductor said that he would like to accommodate us, but that he had orders not to stop at Meridian and that the train would not be stopped there. He told us we had better stop at Morgan and take the morning train down to Meridian. Before we got to Morgan the conductor came around again and asked me if we were going to get off there, and I told him that we were not going to get off at Morgan unless he put us off by force, and he said he was not going to do that. We went on through, and when they called out Clifton we got our baggage together, and the conductor came around to us again and asked us if we were going to get off there, and I told him that we were. This morning when I went to buy the ticket I stated the circumstances to the agent and told him I wanted a receipt for it, and I have a receipt showing that I had to buy a return ticket to Meridian. The conductor did not offer to give me a return ticket to Meridian. The date of the receipt is 4/12/12. "Received of A. O. Watson 30¢. One
105 ticket from Clifton to Meridian," signed B. S. Hill, Agent.

The above statement is substantially correct. (Signed) A. O. Watson.

The plaintiff next introduced and read in evidence letter from F. G. Pettibone, Second Vice President and General Manager of defendant company, to Hon. Jno. L. Wortham, Railroad Commissioner, as follows:

Gulf, Colorado & Santa Fe Railway Company.

Office of 2d Vice-President and General Manager.

F. G. Pettibone, 2d Vice-Pres. and Gen'l Mgr.
J. H. Keefe, Ass't General Manager.

GALVESTON, TEXAS, October 6, 1911.

Subject: Stopping Trains 17 and 18 at Meridian.

Hon. John L. Wortham, Railroad Commissioner, Austin, Texas.

DEAR SIR: Your letter October 3rd., with reference to stopping Trains 17 and 18 at Meridian.

I think in order that you may thoroughly understand the position of our company in this matter, that I should go back and relate to you the conditions that existed prior to the depression in our business this summer.

In addition to the trains mentioned in my letter of September 18th., passenger trains known as Nos. 15 and 16 passed Meridian at 11:48 P. M. and 4:39 A. M. respectively, and we presume that these trains (which, you understand, connected with Trains 17 and 18 at Cleburne) provided necessary accommodations to the citizens of Meridian, and it was the withdrawal of these two trains that in all probability made the Meridian citizens desire the stopping of Trains 17 and 18.

Next week we expect to put on another train between Temple and Cleburne on about the same schedule as Trains 15 and 16,
106 and if, after these trains have been in service sufficient length of time, it is found that there is sufficient patronage to warrant its continuance, they will be left on. This will provide these people with early morning service, and I hope it will be as satisfactory as it was previously, thus obviating the stopping of our limited trains Nos. 17 and 18.

Yours very truly,

F. G. PETTIBONE,
K.,
2nd Vice-Pres. & Gen. Mgr.

The plaintiff next introduced and read in evidence comparative statement of passenger earnings at Meridian, as follows:

MERIDIAN, TEXAS, 5/7/13.

Month.	No.	Single trip amount.	No.	Round trip amount.	No.	Coupon amount.	Total.
1911.							
April.....	379	338.20	98	179.35	33	93.80	$611.35
May.....	403	327.67	115	286.13	46	154.35	768.15
June.....	222	400.05	155	229.20	37	106.00	735.25
July.....	478	451.30	245	326.55	55	159.40	937.25
August.....	506	585.75	124	302.20	82	611.50	1499.45
Sept.....	473	389.90	135	241.60	49	184.95	816.45
1913							
Jan'y.....	405	382.35	128	224.30	37	155.00	761.65
Feb'y.....	338	358.50	146	259.35	36	102.95	720.80
March.....	400	360.50	183	297.55	26	104.65	762.70

This is correct copy of comparative statement of passenger earnings, as per monthly reports for months as shown above.

G. B. DOLAN, *Agent.*

Testimony closed.

107 It is agreed that the foregoing on 49 pages is a full, true and correct statement of all the facts proved and evidence introduced on the trial of said cause No. 28,844, The State of Texas, vs. Gulf, Colorado & Santa Fe Railway Company, in the District Court of Travis County, Fifty-third Judicial District, at the April Term, 1913.

B. F. LOONEY,
Attorney General;
LUTHER NICKELS,
Assistant Attorney General,
Attorneys for The State of Texas, Plaintiff.
TERRY, CAVIN & MILLS,
A. H. CULWELL,
Attorneys for G., C. & S. F. Ry. Co., Defendant.

Examined, approved and ordered filed.

GEO. CALHOUN,
Judge Fifty-third Judicial District.

(Endorsed:) Original Statement of Facts. No. 28844. The State of Texas vs. Gulf, Colorado & Santa Fe Railway Company. Filed July 30, 1913. D. J. Pickle, Clerk. No. 5300. Filed in Court of Civil Appeals, 3rd. Supreme Judicial District, Austin, Texas, Sep. 3, 1913. R. H. Connerly, Clerk.

108 In the Court of Civil Appeals for the Third Judicial District of Texas, at Austin.

No. 5300.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appealed from the District Court of Travis County Texas.

Appellee's Motion to Advance the Cause.

To the Honorable Justices of said Court:

Comes now the State of Texas, appellee in the above styled and numbered cause, and represents unto the court that in this case is involved an enforcement of the provisions of article 6676 R. S. 1911, and the enforcement of an order made by the Railroad Commission under the terms of said article. That the judgment of the trial court requires the appellant company to stop certain passenger trains at the town of Meridian, Bosque County, Texas, the same being the county seat town, and such judgment awards appellee mandamus or mandatory injunction to compel/ compliance with the order of the Railroad Commission ordering the stopping of said trains at said place; that the trial court found as a fact from the evidence that the other facilities furnished the traveling public by appellant at that place are wholly inadequate, and the evidence shows that the interest of the people of Meridian, as well as of the public who desire to go to or away from said town, are being injured by the failure of appellant to stop said trains there; that there are numerous other placed in the state where the railway companies are refusing to stop trains on the theory that the state has no power to require their stoppage, because as they claim, the trains are engaged in interstate commerce, and the *and the* decision of
109 the court in the instant case will likely determine the power of the state to enforce the provisions of said article of the statute and orders of the Railroad Commission made thereunder. That therefore the public is interested in this cause and any delay or postponement of the decision of same by the court of last resort will injuriously effect the rights and interests of the public.

Therefore, appellee moves the court to advance this cause for submission to the earliest practicable date.

B. F. LOONEY,
Attorney General;
LUTHER NICKELS,
Assistant Attorney General,
Attorneys for the Appellee, The State of Texas.

(Endorsed:) Mo. 4181. No. 5300. In the Court of Civil Appeals, Third Supreme Judicial District of Texas, Austin Texas.

G. C. & S. F. Ry. Co. Appellant, vs. State of Texas, Appellee. Appellee's Motion to advance. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Nov. 20, 1913. R. H. Connerly, Clerk. Affirmed.

Order, Made December 10th, 1913, Granting Motion to Advance.

Motion 4181.

#5300.

G., C. & S. F. Ry. Co.
vs.
State of Texas.

Appeal from Travis County.

Motion to Advance the Cause.

The motion is submitted and granted and cause advanced and set for hearing and submission on January 7th, 1914, and clerk ordered to notify the parties hereto hereof in the manner prescribed by law.

110 No. 5300.

The Gulf, Colorado & Santa Fe Ry. Co., Appellant,
vs.
The State of Texas, Appellee.

Appeal from the District Court of Travis County.

Opinion.

This suit was brought in behalf of the State by the Attorney General against appellant to recover penalties for the violation of an order of the Railroad Commission of Texas, requiring appellant to stop its trains Nos. 17 and 18 at Meridian, the county seat of Bosque county, a station on its line, a sufficient length of time for passengers to safely get on and off the cars at said place; and to compel observance of said order it prayed for a writ of mandamus or mandatory injunction.

Appellant, after general demurrer, special exceptions and general denial, defended on the ground (1) that said trains were through trains, engaged in interstate commerce and carrying United States Mails, and that having furnished adequate facilities for the business at Meridian outside of trains 17 and 18, such attempt on the part of the Commission to regulate its service at said point was an unlawful and direct interference with interstate commerce, and hence was void. (2) That the Railroad Commission of Texas was

without authority to make said order. (3) That the judgment of the court in assessing a penalty was excessive, contending that the act was continuous, and that only one penalty could be assessed against it.

A trial before the court resulted in a judgment in favor of appellee, assessing penalties for 224 violations of said order at $100 each, aggregating $22,400, and granting mandatory writ of injunction, as prayed for, from which judgment this appeal is taken.

Meridian is the county seat of Bosque county, duly incorporated, with a population of 1500 inhabitants, situated on the line of appellant's railway, which extends through the state from Galveston to Red River and on to Purcell, in Oklahoma. On March 11th,
111 1912, an order was made by the Railroad Commission of Texas, after due notice and hearing, requiring that on and after the second of April, 1912, said company should regularly stop trains Nos. 17 and 18 at Meridian for a time sufficient to receive and discharge passengers with safety. Said order remained in force continually from said date up to the time of the trial of this case, during which time appellant had operated said trains continuously, with certain exceptions, without stopping thereat, and it now seeks to justify its refusal so to do by urging that said trains were put on chiefly for the purpose of transporting interstate passengers and to compete with other lines of railway for similar business; that it furnished adequate facilities at said point for the accommodation of the traveling public outside of trains 17 and 18, and that such order was violative of the Interstate Commerce Act, and was therefore void.

It was shown that said trains ran from Galveston through to Purcell, Oklahoma, under one management, and thence were transported by the Atchison, Topeka & Santa Fe Ry. Co., another corporation, to Kansas City, Chicago and other points in the Northwest. If it be conceded that appellant furnished adequate facilities for the accommodation of the traveling public at Meridian, outside of trains 17 and 18 and the order in fact materially and directly interfered with such interstate commerce, then it seems that said order, requiring the stoppage of such trains there, was void. But this contention relative to the adequacy of such service is vigorously assailed by the State, and the court's findings in this respect sustain appellee's insistence. It is true that there were two other trains beside those in question, passing Meridian each way daily; yet it appears from the evidence that passengers not infrequently came in on trains 17 and 18, destined for Meridian, who were not permitted to disembark, and were carried on to Morgan and Clifton, the next stations north and south of said town, and were compelled, at extra expense, to return to Meridian by private conveyance. In addition to this fact, none of these trains, except 17 and 18 carried a
112 Pullman furnishing sleeping car accommodations; by reason of which it appeared that citizens of Meridian and vicinity, who desired to do so, were frequently prevented from traveling thereon, because they failed to stop thereat; and in order for such persons to be accommodated, they were required to go either to

Clifton, Cleburne, Temple or Morgan, other stations on its line in order to take passage thereon.

The traveling public along the lines of railway in this State, we think, are entitled to the accommodations furnished by a common carrier, upon compliance with the rules relating — such use. Of course, if the cars of such company fail to stop and receive and discharge passengers at such point, the citizens are thereby deprived of this right. It is no answer to this to say that the companies are not rerequired to furnish sleeping car accommodations. This may be conceded, yet when they do furnish such accommodations to a part of the public, then we think they are required to furnish the same to all others, otherwiso the facilities at such point could not be regarded as adequate. In passing on the adequacy of such facilities, we must look to the convenience and comfort of the passengers, as well as other features of such service. We think the court was justified in finding that adequate facilities were not afforded by appellant to the citizens of Meridian, when it failed to stop the only two trains furnished sleeping car accommodations in and out of said town. It is futile to argue that if it be required to stop at Meridian it may also be required to stop at all other intermediate stations. The law only requires such trains to be stopped at county seats for such purpose; and unless it was shown that the failure to stop at other points along its line would be a clear abuse of its duties to the public, there would possibly be no authority on the part of the Commission to interfere with its failure to do so.

113 Appellant cites in support of its contention the cases of Herndon vs. C. R. I. & P. Ry. Co. 218 U. S., 135; Atlantic Coast Line vs. Wharton, 207 U. S., 328; Illinois Central R. R. vs. Illinois, 163, U. S., 142; C. C. & St. L. Ry. Co. vs. Illinois, 177 U. S. 514; Mississippi R. R. Commission vs. Illinois Central, 203 U. S., 335. A review, however, of these cases we think will show that they are predicated upon facts dissimilar to those in in the instant case in several respects, for which reason they are not regarded by us as of controlling effect. Besides carrying United States mail under contract, the companies involved in those cases were each wholly engaged in interstate traffic, and the transportation of interstate passengers; whereas, in the instant case, appellant carried both intra-state and interstate passengers, and is shown to have stopped in most of the county seats in Texas along its line, as well as other stations; and was scheduled to stop at every station between Red River and Purcell in Oklahoma. Nor was it made to appear in the instant case that a compliance with said order would interfere with such interstate travel, but, on the contrary, the court found that to comply with such order would be an aid thereto.

In the Herndon case, supra, which was an action to require the railway company to comply with the provisions of an act of the state legislature requiring all railroad companies operating within that state to establish depots and stations at junction of other railways and stop a reasonable time for putting off and taking on passengers thereat, it appeared that no necessity existed requiring such stoppage, because ample local accommodations were afforded by several other

trains, and that to stop the trains in question would seriously interfere with travel and connections could not be made as per schedule. The same was also true in the case of C. C. & St. L. Ry. Co. vs. Illinois, supra.

In the Wharton case, supra, ample local facilities outside of the train in question were afforded, two of which carried Pullman sleeping cars, as well as mail, express and baggage cars.

The only objection urged in that case was the want of sufficient speed.

114 In Illinois Central vs. Illinois, supra, to comply with the requirements, it would have been necessary for the train in question to have deviated seven miles from a direct course in order to stop at the particular county seat. In the instant case, the depot of appellant was within the corporate limits of Meridian; and a stop of from three to five minutes, it is shown, would have been sufficient for all purposes.

In Mississippi R. R. Com. vs. Illinois Central, supra, among other things, it is said: "Upon principles decided in the cases referred to, a state Railroad Commission has the right, under a state statute, so far as railroads are concerned, to compel a company to stop its trains under the circumstances already referred to, and it may order the stoppage of such trains if the company does not furnish proper and adequate accommodation to a particular locality, and in such case the order may embrace a through, interstate train actually running, and compel it to stop at a locality named." Also in effect holding that what is adequate accommodation is a question of law to be determined by the facts in each particular case, and all the phases of the service may be looked to and considered in connection with what is meant by "adequate facilities."

In a note to the case of Peterson vs. the State, 14 L. R. A. 293 (N. S.) is found a collection and partial review of the cases on this subject, from which we take the following extract: "It was held in Gladson vs. Minnesota, 166 U. S. 427, affirming 57 Minnesota 385, 24 L. R. A. 502, 59 N. W. 487, that a statute requiring all regular passenger trains to stop at all county seats within the state was valid, and that a train carrying United States mails would not be exempt therefrom. The court distinguished this case from that of Illinois Central vs. Illinois (supra), where it was necessary to deviate seven miles from a direct course in order to stop at a particular county seat, while in the case at bar the trains ran directly through the county seat. In Lakeshore & M. S. R. Co. vs. Ohio, 173 U. S. 285, 43 L. Ed. 702, affirming 8 Ohio C. C. 220, a statute was held valid which required each railroad company operating

115 within the state to cause three each way of its regular trains carrying passengers, if so many were run daily, to stop long enough at a station, city or village containing over 3000 inhabitants, to receive and let off passengers; as such statute was for the public convenience, and did not constitute a regulation of interstate commerce, which would be unconstitutional when applied to trains of a corporation of the state engaged in such commerce. A statute or ordinance regulating the speed of trains within the settled portions

of municipalities is not an unconstitutional regulation of interstate commerce. Erb. vs. Morasch, 177 U. S. 584, 44 L. Ed. 897, and other cases; and such ordinance will not constitute an unlawful interference with the operation of mail trains running exclusively within the confines of a state. Whitson vs. Franklin, 34 Ind. 392." The note further says that "much more drastic applications of the police power than this have been sustained"; citing Knobloch vs. Chicago M. & St. Paul R. R. Co., 31 Minn., 402 18 N. W. 106, and many other cases.

In discussing this subject, Mr. Cook in his work on the Commerce Clause of the Federal Constitution, at page 225, section 101, says: "It is obvious that the complete exercise of what we have seen to be the power of a state to establish, not only regulations 'pertaining to the health, morals or safety of the public,' but even such as are 'designed merely to promote the public convenience' and general welfare must involve power to regulate the conduct of those engaged in transportation within the scope of the commerce clause. A provision for such regulation is, perhaps, especially sustainable, if of general application, and not having a special application to those engaged in such transportation. Under this head excellent illustrations are furnished by provisions regulating the speed of railroad trains or other means of transportation, and otherwise the proper scope of such provisions is very broad and not capable of precise definition. A rather extreme instance seems the prohibition of transportation on the Sabbath, by way of giving effect to the policy of the state to prohibit labor on that day." The same author, section 104, p. 234, holds that there is no inherent objection to a requirement under the authority of the state that a train employed in transportation within the scope of such commerce clause shall stop at certain times and places remarking that to what extent such a requirement is sustainable seems difficult to determine, though it seems vaguely assumed that it must be "a reasonable provision for the public convenience," and is not justified if "all local conditions have been adequately met."

116

Believing as we do, under the findings of the court and the facts of this case as disclosed by the record, that the local service at Meridian, outside of trains Nos. 17 and 18, was inadequate for the accommodation of the public at said station, we hold that the order of the Commission was not violative of the interstate commerce clause of the Federal Constitution, as contended by appellant, and overrule its first seven assignments, predicated thereon.

Again, it is urged on the part of appellant that the Railroad Commission was without authority to enter said order. Concerning this insistence we think it sufficient to call attention to our statute upon this subject (subdivision 2 of art. 6676 R. S. 1911) which provides that "it shall be the duty of the Commissioners to see that upon every railroad and branch of same carrying passengers for hire in this State, shall be run at least one train a day, Sundays excepted, upon which passengers shall be hauled; and the Commission shall have no power to relax this provision; and shall further regulate passenger train service by requiring all passenger trains carrying

passengers for hire to stop for a time sufficient to receive and let off passengers at such stations as may be designated by the Commissioners, provided that four trains each way carrying passengers for hire, if so many are run daily, Sundays excepted, be required to stop as aforesaid at all county seat stations. This statute gives to the Railroad Commission the power to regulate passenger train service as above outlined, and clothed the Commission, we think, with power in the present case to enter the order complained of.

117 The statute further gives to the Railroad Commission the power to enforce the laws and make all reasonable regulations for the operation of railway trains, Art. 6675, R. S.

We do not believe that there is any merit in appellant's contention to the effect that the punishment was excessive, or that only one offence was committed by the company. The evidence showed, and the court found, that there were 224 violations of this order embraced within the time complained of by the prosecution. Article 6672 of the revised statutes, among other things provides that if any railway company doing business in this state shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the Railroad Commission of Texas, for every such act of violation it shall pay to the State of Texas a penalty of not more than $5,000.

Every failure on the part of appellant to stop its trains 17 and 18 at Meridian in obedience to said order constituted, we believe, a complete, separate and distinct violation of law, for which it was subject to the penalty imposed by the statute. In the nature of things it was not and could not be a continuous offence; hence we think the court did not err in adjudging a penalty for every failure on the part of the company to comply with said order; and overrule the assignments relating to this matter.

The remaining assignments have been duly considered, and are regarded without merit.

Finding no error in the proceedings of the trial court, its judgment is in all things affirmed.

Affirmed.

B. H. RICE,
Associate Justice.

Filed June 3, 1914.

118 (Endorsed:) With app. No. 9055. No. 5300. The G. C. & S. F. Ry. Co., Appellant, vs. State of Texas, Appellee. Appeal from Travis County. Opinion. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Jun. 3, 1914. R. H. Connerly, Clerk. Filed in Supreme Court Aug. 25, 1914. F. T. Connerly, Clerk B. H. Rice, Associate Justice.

Judgment, Rendered June 3rd, 1914.

No. 5300.

GULF, COLORADO & SANTA FE RAILWAY COMPANY
vs.
THE STATE OF TEXAS.

Appeal from District Court of Travis County.

Opinion by Associate Justice Rice.

This cause came on to be heard on the transcript of the record and, the same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, the State of Texas, do have and recover of and from the appellant, Gulf, Colorado & Santa Fe Railway Company, principal, and its sureties, H. O. Stein and Sealy Hutchings, the amount adjudged by the court below and all costs in this behalf expended and this decision be certified below for observance.

119 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.

No. —.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appellant's Motion for Rehearing.

Now comes the appellant and files the following as its motion for rehearing herein:

First. The court erred in overruling and failing to sustain appellant's first assignment of error and the propositions thereunder, said assignment being as follows:

"The evidence in this case shows conclusively that each and both of the trains which were ordered to be stopped at Meridian by said order of the Railroad Commission, and for the failure to do which this suit was instituted, were interstate trains, running between Galveston, Texas, to points outside of and beyond the limits of said state; that they were primarily initiated and put on for the handling of interstate business and the rapid transit of the United States mails; and the evidence further showing, as it does, without conflict, that the defendant company had and has by the use of other trains which do stop at Meridian, afforded to the people of that

community adequate train service and all that was reasonably necessary to accommodate the traveling public at said place, wherefore the judgment of the court rendered herein, and based upon the order of the Railroad Commission of Texas is and was violative of paragraph 3, section 8, of the Constitution of the United States, in that the same is an attempt to regulate commerce among the
120 several states, and is therefore void, and the judgment rendered in behalf of the State under these circumstances ought to be set aside all of which was presented in defendant's motion for a new trial, in the fourth ground thereof."

First Additional Proposition under First Assignment.

"The evidence in this case shows that the two trains in question were interstate in character, and put on primarily for the handling of through business and evidence further shows that the defendant, by the use of other trains, has provided adequate train service for the needs of the people at Meridian, and in view of this state of the case the order of the Railroad Commission herein sued upon was void, and was an interference with the interstate business of the defendant, and violated the rights of the defendant as guaranteed to it under the Constitution of the United States.

"Second Additional Proposition under First Assignment.

"Where a railroad company has already provided adequate accommodation at any point, a state regulation requiring interstate trains to stop at such point is an unreasonable burden on interstate commerce, and void under the commerce clause of the Federal Constitution, and the evidence in this case conclusively shows that adequate accommodations had been provided at the station of Meridian, and the regulation under which this suit was brought was and is an unreasonable burden on interstate commerce and void."

Second. The court erred in overruling and failing to sustain appellant's second assignment of error, said assignment being as follows:

"The judgment of the Court herein is erroneous, because the evidence affirmatively shows that the two trains in question, to-wit, Nos. 17 and 18, handle the United — mails under a contract with the United States Government; that they are through trains, which, in connection with the Atchison, Topeka & Santa Fe Rail-
121 way Company, afford a through and rapid service between Galveston and the cities north and east; and in view of these facts, which appear without conflict, and of the further fact that adequate train service is afforded to the people of Meridian by other trains, the judgment of the court is erroneous and violative of the Fourteenth Amendment to the Constitution of the United States, and same is a taking of the defendant's property without due process of law, and is a denial to it of equality before the law, all of which was presented in defendant's motion for a new trial in the sixth ground thereof."

"Appellant respectfully presents the same additional propositions under this assignment as those stated under the first assignment."

Third. The court erred in overruling and failing to sustain appellant's third assignment of error, said assignment being as follows:

"The evidence conclusively shows that the defendant company is stopping at Meridian all of the trains that are and were reasonably necessary to accommodate the traveling public thereat, and that the defendant had and has provided by the use of other trains all of the service incumbent upon it under the law, and which said service is adequate and reasonably sufficient for the accommodation of the traveling public to or from the station of Meridian; and the judgment of the Court, therefore, rendered herein for the State, is not supported in the evidence and has no evidence to sustain it, and the same is and was an interference with the defendant in the handling of its interstate commerce; and in all of these respects the judgment of the Court is erroneous, and ought to be set aside, all of which was presented in defendant's motion for a new trial in the third ground thereof."

"Appellant respectfully asks to be allowed to present the same additional proposition under this assignment as those stated under the first assignment."

122 Fourth. The Court erred in overruling and failing to sustain appellant's fourth assignment of error, said assignment being as follows:

"The Court erred in holding that the order of the Railroad Commission of Texas, requiring the defendant company to stop its trains Nos. 17 and 18 at Meridian was valid and enforceable, for the reason that under the evidence adduced on the trial of this case neither of said trains was subject to the order and jurisdiction of the Railroad Commission of Texas, because the evidence affirmatively shows that said trains were interstate in character and used primarily for the purpose of handling interstate Commerce; and the order of the Commission as herein sued upon was void, and the Commission had no jurisdiction to enter the same or any other order as affecting the stoppage of said trains at any point, all of which was presented in defendant's motion for a new trial in the second ground thereof."

"Appellant states the same additional propositions under this assignment as those stated under the first assignment."

Fifth. The Court erred in overruling and failing to sustain appellant's fifth assignment of error, said assignment being as follows:

"The evidence in this case shows that no other train besides those which stop at Meridian is necessary for the accommodation of the traveling public thereat; and the judgment of the Court herein, as well as the order of the Railroad Commission in this cause, imposes an unreasonable burden upon the defendant and requires of it an unnecessary service, and same is therefore an infringement of the private rights of the defendant company, all of which was presented in defendant's motion for a new trial in the tenth ground thereof."

123 Sixth. The Court erred in overruling and failing to sustain appellant's sixth assignment of error, said assignment being as follows:

"The evidence in this case shows affirmatively that the amount of business originating at and destined to Meridian does not and will not warrant the defendant in stopping any other, further or additional trains at that place, and does not warrant defendant in stopping its trains Nos. 17 and 18 thereat; that any destination to be reached by either of said trains can be reached by other trains which are scheduled to stop thereat, and that as said trains are interstate trains, handling interstate commerce in sharp competition with other lines of railroad engaged in similar business, the statute of the State of Texas under which the order of the Railroad Commission was issued and the order of the Railroad Commission itself and the judgment of the court rendered herein are unconstitutional and void and violative of paragraph 3, Section 8, of the Constitution of the United States, and same ought to be set aside, all of which was presented in defendant's motion for a new trial in the tenth ground thereof."

Seventh. The Court erred in overruling and failing to sustain appellant's seventh assignment of error, said assignment being as follows:

"The Court erred in its conclusion of law No. 6 wherein it is found as a matter of law that the defendant had willfully disobeyed the order of the Commission because not more than four trains carrying passengers each way pass Meridian. If the service afforded to the people of Meridian was adequate it then had the right to run interstate trains through said station without stopping although not more than four passenger trains daily were run each way."

Eighth. The Court erred in overruling and failing to sustain appellant's eighth assignment of error and the propositions thereunder, which said assignment was as follows.

"The Court erred in its conclusion of law No. 4 wherein it is held that the service afforded to the people of Meridian is not
124 adequate and sufficient, inasmuch as no trains other than 17 and 18 have any sleeping car accommodations or facilities. This conclusion of law places a burden upon the defendant not warranted by any statute in this State and not warranted under the order of the Railroad Commission of Texas ordering the stopping of these trains at Meridian. This defendant is not required to furnish sleeping-car accommodation to any community and the facts as to whether or not the service afforded to any place is adequate and sufficient may not even in part be determined by reference to the sleeping car accommodations furnished. Such a conclusion of law imposes a liability upon this defendant which is unwarranted and the Honorable Trial Court basing its judgment, as it does, upon such a conclusion erred."

"First Additional Proposition under Eighth Assignment.

"It is no part of the duty of a Railway Company to furnish sleeping-car accommodations on any of its trains. There is no law in this state which requires the same, nor is the Railroad Commission clothed with authority so to do. Wherefore, the question as to the

inadequacy of train service at any given place may not be determined even in part by the fact that such community is not provided with trains having sleeping car accommodations."

"Second Additional Proposition under Eighth Assignment.

"The liability of the Railway Company herein cannot be determined, nor the rights of the people of Meridian affected by the fact that neither of the trains that stop at Meridian carry sleepers. The Railroad Commission was without authority to require such accommodation and the fact that it was not furnished cannot be made the basis of any judgment herein."

Ninth. The Court erred in overruling and failing to sustain appellant's ninth assignment of error and the proposition thereunder, which said assignment was as follows;

"The order of the Railroad Commission of Texas on which this suit was predicated is and was void, and was made without
125 authority of law, for this, that the statute regulating the stopping of trains at county seats is and was mandatory, and no discretion relative thereto was lodged with the Railroad Commission, and whether or not the train service at Meridian was adequate, was an immaterial inquiry, and the finding of the Commission to the effect that the train service thereto was not adequate did not empower the Commission to enter the order that was entered, and on which suit herein was filed."

"First Additional Proposition under Ninth Assignment.

"The statute has not clothed the Railroad Commission with any authority relative to the stopping of trains at county seat towns and the Commission is not authorized by law to make any order relative to railroads stopping trains at such places. If the statute in question was effective, the same was a positive demand as against the Railway Company and the prosecuting officers of the State were warranted in using such process as may be deemed necessary to secure the observance thereof, but no order of the Railroad Commission could effect this purpose to be made the basis of an action and as the judgment entered herein was based upon the order of the Railroad Commission which affected a subject beyond the power of the Commission, the same is and was void."

Tenth. The Court erred in overruling and failing to sustain appellant's tenth assignment of error and the proposition thereunder, which said assignment was as follows:

"The findings of the Trial Court herein to the effect that the train service in and to Meridian was inadequate and not sufficient for the comfort or convenience of the people desiring train service at that point, is and was wholly immaterial, and the court was not warranted in entering a judgment against the defendant on such a conclusion of fact."

"First Additional Proposition under Tenth Assignment.

"The question as to the adequacy of train service at a county seat station is wholly immaterial under the laws of this state. If
126 the statute is interpreted to regulate the trains in question, then it was the duty of the defendant to stop same at said station and the Railroad Commission was not warranted in entering any order, and it was wholly immaterial as to what the character of train service at that station was, assuming that not more than four passenger trains each way were run."

Eleventh. The Court erred in overruling and failing to sustain appellant's eleventh assignment of error, said assignment being as follows:

"The judgment entered herein is and was void as to the penalties assessed, for this, that the statute requires as many as four trains per day each way be stopped at all county seats, if so many are run, and the Railroad Commission of Texas was not clothed with the authority to file suit for penalties for the failure of a railway company to comply with said statute, and the District Court of Travis county was without power to assess a penalty for the violation of such statute."

Twelfth. The Court erred in everruling and failing to sustain appellant's twelfth assignment of error, said assignment being as follows:

"There is no statute in this state under which a penalty can be assessed against a railway company for its failure to stop any given number of trains at a county seat station, and the judgment of the District Court of Travis county awarding penalties on such a state of facts is and was without authority of law and void."

Thirteenth. The Court erred in overruling and failing to sustain appellant's thirteenth assignment of error and the propositions thereunder, said assignment being as follows:

"The Court erred in entering judgment herein, awarding to the state of Texas a writ of mandamus and mandatory injunction, requiring the defendant to stop its trains 17 and 18 at Meridian, for the reason that it affirmatively appears that by other trains which do stop at the station of Meridian adequate train service in all
127 respects reasonable is afforded to the people of that community—such evidence showing, as it does, that three other trains in each direction are stopped at that station for the purpose of receiving and discharging passengers, all of which was presented in defendant's motion for a new trial in the fifth ground thereof."

First Additional Proposition under Thirteenth Assignment.

"No writ of mandamus or mandatory injunction was warranted under the facts of this case for the reason that the order of the Commission was void, and the Court was without authority to award affirmative relief based upon such void order. The statute did not give to the Commission authority to enter the order, and there is no law in this state warranting the issuance of a mandatory injunction for refusal to comply with a void order of the Commission."

"Second Additional Proposition under Thirteenth Assignment.

"Insofar as this case is concerned, it is immaterial whether or not the train service at Meridian at the time this suit was filed was adequate or not, because the evidence showing as it does, that at the time of the trial of this case the service at that point was adequate the state was not entitled to a writ of mandamus or mandatory injunction."

Fourteenth. The Court erred in overruling and failing to sustain appellant's fourteenth assignment of error and the proposition thereunder, said assignment being as follows:

"The Court erred in rendering a judgment herein for the plaintiff in the sum of $22,400.00, for the reason that if the defendant is liable herein it is liable only for one violation, and only one penalty should have been assessed, all of which was presented in defendant's motion for a new trial in the seventh ground thereof."

First Additional Proposition under Fourteenth Assignment.

"The statute, under which this penalty was assessed, does not allow a cumulative punishment, and if the defendant was liable,
128 it was liable for its failure to perform a duty enjoined upon it by law, and for such failure only one penalty may be collected and which may not exceed $5,000.00."

Fifteenth. The Court erred in overruling and failing to sustain appellant's fifteenth assignment of error, said assignment being as follows:

"The Court erred in rendering judgment herein in the sum of $22,400.00, for the reason that if the defendant is liable herein it cannot be assessed for two penalties for each day that it failed to stop its trains Nos. 17 and 18 at Meridian; and the judgment rendered herein is and does allow to the plaintiff a separate penalty for each train that failed to stop at Meridian for each day after the order of the Railroad Commission went into effect; and the Court erred in holding and concluding that the penalty statute under which this suit was maintained authorized the assessing of a penalty on that basis, all of which was presented in defendant's motion for a new trial in the eighth ground thereof."

Sixteenth. The Court erred in overruling and failing to sustain the appellant's sixteenth assignment of error and the proposition thereunder, said assignment being as follows:

"The Court erred in its thirty-fourth finding of fact wherein it is stated that the service and accommodation furnished by the defendant at Meridian, exclusive of trains 17 and 18, was wholly inadequate to serve and accommodate the comfort and convenience of the traveling public. Such a finding of fact is wholly immaterial to any proper or legal issue in this case nor is same supported by any of the evidence offered."

"First Additional Proposition under Sixteenth Assignment.

"Appellant states the same additional proposition under this assignment as that stated under ninth assignment."

Seventeenth. The court erred in overruling and failing to sustain appellant's seventeenth assignment of error, said assignment being as follows:

129 "The Court erred in its finding of fact No. 35, wherein it is stated that residents of Meridian who make trips to other states have no access to any through train of the class or equipment of Nos. 17 and 18. Such a finding of fact is directly contradicted by the agreed statement of facts in this case, by which agreed statement the state is bound, and there is no evidence in this record to sustain such a finding, but the evidence and agreed statement of facts clearly show that any destination which is reached by trains Nos. 17 and 18 can be reached by the use of the other trains which do stop at Meridian, and there is not a particle of evidence in the record to the effect that the equipment on the other trains is any different from that on trains 17 and 18 except that some of them do not afford Pullman car accommodation, but this accommodation is one not required of the defendant as a common carrier, nor the people of Meridian or any other community entitled thereto from the defendant as a common carrier."

Eighteenth. The Court erred in overruling and failing to sustain appellant's eighteenth assignment of error, said assignment being as follows:

"The Court erred in its finding of fact No. 39, in that there is no evidence indicating that the principal reason for stopping this train at other points is the revenue to be derived. There is not a line of evidence to this effect in the record, but the record does affirmatively show the reason for stopping of these trains at the places named, which is an entirely different reason from the one found by the Court. Wherefore, the finding in this behalf is wholly unsupported by the evidence and directly contradicted by the evidence."

Nineteenth. The Court ered in overruling and failing to sustain appellant's nineteenth assignment of error, said assignment being as follows:

"The conclusion of law No. 5, as stated by the Court to the effect that a part of the travel on trains 17 and 18 is intrastate is wholly immaterial and the judgment of the court based in part as it is upon such a conclusion of law is erroneous. The description

130 of this train as interstate in character cannot in law be denied to the defendant, simply because it does carry intrastate passengers."

Twentieth. The Court erred in overruling and failing to sustain appellant's twentieth assignment of error and the propositions thereunder, said assignment being as follows:

"The statute under which the find assessed herein was imposed is unconstitutional and void, and the fine herein assessed is excessive and out of proportion to the offense committed, if any; and such fine is therefore violative of the Fourteenth Amendment to the Constitution of the United States, as well as of Section 13, Article 1, of the Constitution of Texas, in that said fine is cruel and an unusual penalty is thereby assessed. The judgment is excessive because this was and is a friendly law-suit and because the Railroad Commission

was and is not really seeking or asking to collect penalties, but was and is seeking to test the authority of the Commission, all of which was presented in defendant's motion for new trial in the tenth ground thereof."

First Additional Proposition under Twentieth Assignment.

"The fine imposed herein was out of all reasonable proportion to the acts committed even if every contention of the state is correct. No such offense was committed that warrants the taking of the property of defendant as is decreed by this judgment."

Second Additional Proposition under Twentieth Assignment.

"The fine herein imposed, being as it is unusual, cruel and excessive, is violative of the Constitution of the United States and of the State of Texas.

Third Additional Proposition under Twentieth Assignment.

"If the interpretation placed upon the penalty statute under which this fine was assessed is correct then the statute is violative of the Constitution of the United States and of the Fourteenth Amendment thereof in that it takes defendant's property without due process of law."

131 Twenty-first. The Court erred in overruling and failing to sustain appellant's twenty-first assignment of error, said assignment being as follows:

"The Court erred in its finding of fact No. 43 wherein it is stated that the sum of $100.00 is a just and reasonable penalty for its failure to stop the said trains as required. Such a penalty is wholly out of proportion to the alleged offense and amounts in effect to confiscation. This was unwarranted, oppressive — is not supported in law or fact."

"Appellant presents the same additional propositions under this assignment as those stated under the Twentieth assignment."

Twenty-second. The Court erred in overruling and failing to sustain appellant's twenty-second assignment of error, said assignment being as follows:

"The Court erred in its thirty-sixth finding of fact wherein it is stated that the order of the Railroad Commission, ordering the stopping of trains 17 and 18 at Meridian is an aid to interstate commerce. There was certainly no evidence to sustain such a finding and the same is purely a creature of the imagination of the learned District Judge preparing the same."

Twenty-third. The Court erred in overruling and failing to sustain appellant's twenty-third assignment of error, said assignment being as follows:

"The Court erred in its finding No. 37 wherein it is found that exclusive of trains 17 and 18 the residents of Meridian have access to only one mail train southbound daily and only access to one mail

train northbound daily. There is no evidence in this record to sustain such a finding of fact and the Trial Court erred in so concluding. Such a finding is not only contradictory to all of the evidence but is highly prejudicial to the defendant in this case."

Twenty-fourth. The Court erred in overruling and failing to sustain appellant's twenty-fourth assignment of error, which said assignment was as follows:

132 "The Court erred in its thirty-sixth finding of fact wherein it is stated that the order of the Railroad Commission, ordering the stopping of trains 17 and 18 at Meridian is an aid to interstate commerce. There was certainly no evidence to sustain such a finding and the same is purely a creature of the imagination of the learned District Judge preparing the same."

Twenty-fifth. The Court erred in overruling and failing to sustain appellant's twenty-fifth assignment of error, said assignment being as follow:

"The Court erred in its finding of fact No. 32 in stating that the equipment on the other passenger trains run by the defendant Company through Meridian is much inferior to the equipment carried on trains 17 and 18. There is no evidence to support such a finding in the record. It is purely the creature of imagination and in truth is directly contrary to all the evidence in the case."

Twenty-sixth. The Court erred in holding that under the law this appellant is required to stop at least four of its passenger trains each way daily, if so many were run at the station of Meridian, for the reason that the act of the legislature so directing and requiring, same being known as Chapter 117, Acts of the Regular Session of the 28th Legislature, being the act presented to the Governor of Texas for his approval on the first day of April, 1903, is void because said act insofar as it requires Railway Companies to stop four trains each way carrying passengers, if so many are run, daily to stop at county seat stations, is unconstitutional and void because same is violative of Article 3, Section 35 of the Constitution in that the above named subject is not mentioned nor expressed in the title to the bill. The subject of the requirement and on which the judgment herein is based is not expressed in the title to the *bill. The subject of the requirement and on which the judgment herein is based is not expressed in the title to the* act. While the act in its title expresses that it is to enlarge the powers of the Railroad Commission relative to passenger train service yet that portion of the act under

133 which this case was *rp*osecuted is and was mandatory in its terms and no power was confided to the Railroad Commission relative thereto. Wherefore, this provision of the act is and was void and the judgment of the court being based thereon is likewise void.

Twenty-seventh. The Court erred in holding that it was the duty of appellant under the law to stop at the station of Meridian four passenger trains daily, running each way, if so many were run, because there is no law so requiring and under the facts of this case it affirmatively appears that there is and was no necessity, public or otherwise, requiring so many trains to be stopped at that station

and the judgment of the Court was an undue, harsh, unnecessary and arbitrary exercise of power and thereby appellant was deprived of the privilege of managing its own business.

Twenty-eighth. The Court erred in affirming the judgment entered herein and in holding that the two trains in question were subject to the jurisdiction of the Railroad Commission of Texas and that said Commission had the right and authority to make the order that was entered herein.

Twenty-ninth. The appellant respectfully requests the Court for an additional finding of fact to the effect that at the time this cause was tried in the District Court of Travis county and for some time prior thereto and at all times since the appellant was running four passenger trains daily each way through the station of Meridian and that three of same each way were scheduled to stop thereat. It is true that when the order of the Railroad Commission was entered the appellant was only running three trains daily each way past Meridian and only two of same were scheduled to stop but it is undisputed that another train was afterwards put on which did and does stop at Meridian. We do not deem it necessary to point out the line and page of the record showing this as the State does not dispute it. It clearly appears from the testimony of Mr. Hull, as well as from the time card that was offered. Wherefore, this appellant asks that there be a finding of fact to this effect.

134 The appellant will file, and here now asks leave to file, an argument in support of this, its motion for a rehearing, and asks to have said argument considered in connection with said motion.

It is represented that the Hon. B. F. Looney, Attorney General of Texas, and the Hon. Luther Nickels, Assistant Attorney General of Texas, are the Attorneys of record for the appellee, State of Texas, herein and each of whom reside at Austin, Texas.

Wherefore, appellant presents this, its motion for rehearing, asks for service thereof in terms of the law and that on hearing that same may be granted and this cause reversed, as prayed for in its original brief.

Respectfully submitted,

TERRY, GAVIN & MILLS,
A. H. CULWELL,
Attorneys for Appellant, Gulf, Colorado and Santa Fe Railway Company.

(Endorsed:) No. 5300. No. 9055. With App. Mo. 4343. Gulf, Colorado & Santa Fe Ry. Co., appellant vs. State of Texas, Appellee. Motion for Rehearing. Overruled. Filed in Court of Civil Appeals 3rd Supreme Judicial District Austin, Texas, Jun- 16, 1914. R. H. Connerly, Clerk. Filed in Supreme Court Aug. 25, 1914. F. T. Connerly, Clerk.

Order, Made July 1st, 1914, Overruling Motion for a Rehearing.

Motion 4343.

#5300.

GULF, COLORADO & SANTA FE RAILWAY COMPANY
vs.
STATE OF TEXAS.

Appeal from Travis County.

Motion for a Rehearing.

The motion is overruled.

135 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.

No. —.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant.
vs.
THE STATE OF TEXAS, Appellee.

Now comes the appellant and asks the court for an additional finding of fact herein as follows:

It is stated in the opinion affirming the judgment herein that the appellant was running three passenger trains per day each way past the station of Meridian, and that two of said trains each way were scheduled to stop at said station. This is a correct statement of the facts as same existed at the time the order of the Railroad Commission was entered herein, but it is not a correct statement of the facts as they existed at the time of the trial of this case in the District Court of Travis county and at the time the judgment herein was entered. All the facts show that at the time of the trial of this cause the appellant was operating four trains per day each way past the city of Meridian and that three of said trains each way were scheduled to stop at said station. There is no controversy about these facts and same was conceded by the state to be true.

We therefore ask the court for a finding of fact to the above effect, and this request is made hereby and by additional ground appearing in our motion for rehearing.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
Attorneys for Gulf, Colorado and Santa Fe Railway Company.

(Endorsed:) No. 5300. Mo. 4344. With app. No. 9055. Gulf, Colorado & Santa Fe Ry. Co., Appellant, vs. State of Texas, Appellee. Motion for additional findings of fact. Filed in Supreme Court Aug. 25, 1914. Granted. F. T. Connerly, Clerk. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, June 16, 1914. R. H. Connerly, Clerk.

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No. 5300.

GULF, COLORADO & SANTA FE RAILWAY CO., Appellant,
vs.
STATE OF TEXAS, Appellee.

Additional Findings of Fact.

In response to appellant's motion for additional findings of fact, we state that at the time of the trial it appeared that four trains per day were operated each way by appellant through Meridian, three of which were scheduled to stop thereat, but that trains Nos. 17 and 18 were not among those so scheduled, and they did not in fact at any time stop in obedience to the order of the Railroad Commission.

B. H. RICE,
Associate Justice.

Filed July 1, 1914.

(Endorsed:) With App. No. 9055. No. 5300. G. C. & S. F. Ry. Co., Appellant, vs. State of Texas, Appellee. Additional Findings of Fact. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Jul- 1, 1914. R. H. Connerly, Clerk. Filed in Supreme Court Aug. 25, 1914. F. T. Connerly, Clerk. B. H. Rice, Associate Justice.

Order, Made July 1st, 1914, Granting Motion for Additional Findings of Facts.

Motion 4344.

#5300.

GULF, COLORADO & SANTA FE RAILWAY COMPANY
vs.
STATE OF TEXAS.

Appeal from Travis County.

Motion for Additional Findings of Facts.

The motion is granted.

137 In the Supreme Court of Texas.

No. —.

In the Supreme Court of Texas.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

Application for Writ of Error.

The Supreme Court of Texas:

This is the petition of the Gulf, Colorado and Santa Fe Railway Company, complaining of that certain judgment entered in the Court of Civil Appeals for the 3rd Supreme Judicial District of Texas on the 3rd day of June, 1914, and in which petitioner's motion for a rehearing was overruled on the 1st day of July, 1914, whereby the judgment entered in the District Court of Travis county on the 27th day of June, 1913, and against your petitioner for penalties aggregating $22,400.00 and awarding a mandatory injunction against your petitioner requiring obedience to an order of the Railroad Commission directing that two certain named passenger trains operated by your petitioner be required to stop at the station of Meridian, is and was in all things affirmed. It is deemed sufficient under the rules governing applications for writs of error to say that the Railroad Commission of Texas under date of March 11th, 1912, made an order requiring your petitioner to stop its passenger trains Nos. 17 and 18 at the station of Meridian, a county seat, and upon refusal to comply therewith suit was instituted for penalties in the sum of $5,000.00 for each and every time defendant failed to stop each of said trains at said station from and after April 2nd, 1912, and for a mandamus requiring it to so stop said trains, and each of them. The defenses inter-

138 posed will appear in the assignments hereinafter presented, and your petitioner herein presents as

Grounds of Jurisdiction.

That this case is one of which the Supreme Court has jurisdiction under Art. 1521, Revised Statutes of 1911, as amended by Chapter 55 of the Acts of the 33rd Legislature, because:

(*a*) The Court of Civil Appeals has erroneously declared the substantive law of the case, in that court held affirmatively that the question of adequacy of train service at a given station be determined by the fact that none of the trains which were scheduled to stop thereat carried Pullman sleeping cars and that it would be and was discrimination against one station on the line of a railroad to fail to furnish Pullman car accommodations on trains stopping at that station when and where it appeared that such accommoda-

tions were furnished at other stations along the line of said road, and that the failure to so furnish such accommodations at the station of Meridian indicated an inadequacy of train service thereat, for which a suit such as is herein maintained could be prosecuted. The ruling complained of herein was upon a question of law that substantially affected the right of the plaintiff to recover and the right of your petitioner to maintain its defense.

(*b*) It is herein represented that the order of the Railroad Commission on which this suit was based and the judgment of affirmance herein complained of is and was void, because it affirmatively
139 appeared that the two trains which by the order of the Commission were required to be stopped at Meridian were each and both interstate in character, that the Railroad Commission of Texas was not empowered and had no jurisdiction to make the order complained of nor was the State entitled to relief sought in this case, for the reason that the evidence conclusively showed that the train service furnished by your petitioner to and from the station of Meridian was entirely adequate in every particular enjoined upon it by law, and, therefore, that your petitioner was warranted in establishing its own schedule for the two trains in question, same having been put on primarily to handle the interstate business of your petitioner and its connecting lines. That the order of the Commission herein complained of as well as the judgment of the Court of Civil Appeals was an unlawful and arbitrary interference with the interstate commerce handled by your petitioner and because of all of which the said Court of Civil Appeals has erroneously declared the substantive law of the case and the ruling herein complained of was upon a question of law that substantially affected the right of the plaintiff to recover as well as the right of your petitioner to maintain its defense.

(*c*) The Court of Civil Appeals has erroneously declared the substantive law of the case and the ruling complained of herein was upon a question of law that substantially affected the right of the plaintiff to recover and the right of your petitioner to maintain its defense in this, that said court has construed Section 2 of Art. 6676, Revised Statutes, as empowering the Railroad Commission of Texas to enter an order requiring railroads to stop as many as four trains hauling passengers running each way at County seats, if so many shall be operated. That such construction of said statute is erroneous because thereunder the Railroad Com-
140 mission of Texas is confided with no discretion. The statute is mandatory in terms. No order from the Railroad Commission of Texas relative to the same was either required or permitted. If the trains involved in this litigation were subject to the laws of this State a positive duty was imposed and there is no statute authorizing the Railroad Commission to enter an order affecting the statutory duty of a railroad and by entering such an order thereby subject the carrier to large and extreme penalties for a violation thereof. The Attorney General of Texas was authorized to file this suit without any order from the Railroad Commission and the entry of the order made basis of this litigation did not and could not add to the liability of your petitioner.

(*d*) This is a case in which the Court of Civil Appeals has erroneously declared the substantive law of the case and the ruling herein complained of was upon a question of law that substantially affected the right of the plaintiff to recover as well as the right of your petitioner to maintain its defense in this, the Court of Civil Appeals has erroneously construed Art. 6672, Revised Statutes, and held that each time and each day your petitioner failed to stop each, or either, of the trains in question at Meridian after the entry of the order to that effect constituted a separate offense, and your petitioner was subjected to the payment of a penalty which could, if the trial court so held, amount to $5,000.00 for each time either of said trains failed to stop at the station of Meridian, whereas in truth if it shall be held that the order of the Railroad Commission was valid and the trains in question were subject to its jurisdiction there was yet the violation of but one order of the Railroad Commission and for which only one penalty not to exceed $5,000.00 might be assessed.

(*dd*) This is a case in which the Court of Civil Appeals has erroneously declared the substantive law of the case, and the ruling herein complained of was upon a question of law that substantially affects the right of the plaintiff to recover, in this, that the Court of Civil Appeals decided the issue against your petitioner, on the ground, in substance, that having provided sleeping cars to stop at other stations, it was a discrimination not to provide sleeping cars to stop at Meridian, and affirmed the judgment against your petitioner on such theory of discrimination whereas if your petitioner was so guilty of any discrimination, it was under subdivison 1 of Article 6670, which makes it an unjust discrimination to give any undue or unreasonable preference to *to* any person or locality, or to subject any particular description of traffic to any undue prejudice, and as this article provides a penalty of not less than $500.00 nor more than $5,000.00 for its violation, a different penalty could not be created by the making of an order by the Commission. This ground was presented on motion for rehearing.

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(*e*) This is a case in which the Court of Civil Appeals has erroneously declared the substantive law of the case and the ruling complained of was upon a question of law that substantialy affected the right of the plaintiff to recover as well as the right of the defendant to maintain its defense in this, said court has declared that where a railway company runs trains to which are attached Pullman cars and which are scheduled to stop at a given station that it is required to furnish equal accommodations to another town on its line of road, whereas under the law no duty is imposed upon a railway company to furnish Pullman car accommodations, and to run trains to which are attached such cars is a matter within the sound discretion of the *carrer* itself and its judgment as to what trains shall handle Pullman cars, if any, may not be interfered with by the Railroad Commission of Texas nor by the courts, and the adequacy of train service at any given point may not be determined even in

part by a consideration of the question of sleeping car accommodations.

142 (*f*) The Court of Appeals has construed as per the opinion in this case Art. 6672, Revised Statutes, as authorizing the assessment of a penalty for each time each train failed to stop at a given station in disobeyance to a Railroad Commission order and as so construed the statute under which the penalties are and may be assessed is violative of the Fourteenth Amendment to the Constitution of the United States, because the fines which may be imposed thereunder are so enormous that persons affected thereby may be and are prevented from resorting to the courts for the protection of an assumed right and the construction so placed by said Court of Civil Appeals on said statute denies to the litigant the equal protection of the law guaranteed not only under the Constitution of the United States and the Fourteenth Amendment thereof but by Section 13, Art. 1 of the Constitution of Texas also, and said Court of Civil Appeals by so construing said statute has erroneously declared the substantive law of the case and such ruling is upon a question of law that substantially affects the right of your petitioner to maintain its defense.

(*g*) This court has jurisdiction herein because the Railroad Commission of Texas is a party, in that a judgment has been entered against your petitioner for the violation of an order of the Railroad Commission, which said order is made the basis of this suit and without which the judgment herein complained of could not have been rendered, and your petitioner herein presents as ground of jurisdiction as provided in paragraph *f*, Rules of this Court, each, every and all of the questions of law arising under the above paragraphs, alleging that they are each and all material and under which the rights of your petitioner were materially affected.

143 (*h*) Your petitioner represents that the act of the Legislature requiring railroads to stop at county seat stations as many as four passenger trains a day each way, if so many are run, and being Chapter 117, Regular Session 28th Legislature, is void and violative of Art. III, Section 35, of the Constitution of this State, in that the stoppage of passenger trains at county seat stations is not mentioned nor expressed in the title to the bill or act and this case, therefore, involves the validity of a statute and that paricular provision of the above mentioned statute, which requires that four passenger trains per day each way shall stop at county seat stations, if so many are run, for the reasons above specified.

(*i*) Your petitioner represents that each of the particular rulings and decisions of the court of Civil Appeals herein complained of were assigned as error in the motion for rehearing in said court as well as in the motion for a new trial in the District Court of Travis County on the original presentation of this case in the Court of Civil Appeals, and your petitioner represents that same caused the rendition of an improper judgment herein.

The assignments presented below and following are the same assignments as those presented in the Court of Civil Appeals, except as otherwise indicated.

Second Section.

First Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain your petitioner's first assignment of error presented in that court, together with the propositions thereunder, which was as follows:

144 "The evidence in this case shows conclusively that each and both of the trains which were ordered to be stopped at Meridian by said order of the Railroad Commission, and for the failure to do which this suit was instituted, were interstate trains, running between Galveston, Texas, to points outside of and beyond the limit of said state; that they were primarily init-ated and put on for the handling of interstate business and the rapid transit of the United States mails; and the evidence further showing, as it does, without conflict, that the defendant company had and has by the use of other trains which do stop at Meridian, afforded to the people of that community adequate train service and all that was reasonably necessary to accommodate the traveling public at said place, wherefore the jurgment of the Court rendered herein and based upon the order of the Railroad Commission of Texas is and was violative of paragraph 3, section 8, of the Constitution of the United States, in that the same is an attempt to regulate commerce among the several states, and is therefore void, and the judgment rendered in behalf of the State under these circumstances ought to be set aside, all of which was presented in defendant's motion for a new trial, in the fourth ground thereof."

"First Additional Proposition under First Assignment.

"The evidence in this case shows that the two trains in question were interstate in character, and put on primarily for the handling of through business, and the evidence further shows that the defendant, by the use of other trains, has provided adequate train service for the needs of the people at Meridian, and in view of this state of the case the order of the Railroad Commission herein sued upon was void, and was an interference with the interstate business of the defendant as guaranteed to it under the Constitution of the United States."

145 "Second Additional Proposition under First Assignment.

"Where a railroad company has already provided adequate accommodation at any point, a state regulation requiring interstate trains to stop at such point is an unreasonable burden on interstate commerce, and void under the commerce clause of the Federal Constitution, and the evidence in this case conclusively shows that adequate accommodations had been provided at the station of Meridian, and the regulation under which this suit was brought was and is an unreasonable burden on interstate commerce and void."

Second Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain your petitioner's second assignment or error presented in that court, which was as follows:

"The judgment of the Court herein is erroneous, because the evidence affirmatively shows that the two trains in questions, to-wit, Nos. 17 and 18, handle the United States mails under a contract with the United States Government; that they are through trains, which, in connection with the Atchison, Topeka & Santa Fe Railway Company, afford a through and rapid service between Galveston and the cities north and east; and in view of these facts, which appear without conflict, and of the further fact that adequate train service is afforded to the people of Meridian by other trains, the judgment of the Court is erroneous and violative of the Fourteenth Amendment to the Constitution of the United States, and same is a taking of the defendant's property without due process of law, and is a denial to it of equality before the law, all of which was presented in defendant's motion for a new trial in the sixth ground thereof."

146 Petitioner respectfully presents the same additional propositions under this assignment as those stated under the first assignment.

Third Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain your petitioner's third assignment of error presented in that Court, which was as follows:

"The evidence conclusively shows that the defendant company is stopping at Meridian all of the trains that are and were reasonably necessary to accommodate the traveling public thereat, and that the defendant had and has provided by the use of other trains all of the service incumbent upon it under the law, and which said service is adequate and reasonably sufficient for the accommodation of the traveling public to or from the station of Meridian, and the judgment of the Court, therefore, rendered herein for the State, is not supported in the evidence and has no evidence to sustain it, and the same is and was an interference with the defendant in the handling of its interstate commerce; and in all these respects the judgment of the Court is erroneous, and ought to be set aside, all of which was presented in defendant's motion for a new trial in the third ground thereof."

Petitioner respectfully asks to be allowed to present the same additional propositions under this assignment as those stated under the first assignment.

Fourth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain your petitioner's fourth assignment of error presented in that court, which was as follows:

147 "The Court erred in holding that the order of the Railroad Commission of Texas, requiring the defendant Company to stop its trains Nos. 17 and 18 at Meridian was valid and enforceable, for the reason that under the evidence adduced on the trial of this case neither of said trains was subject to the order and jurisdiction of the Railroad Commission of Texas, because the evidence affirmatively shows that said trains were interstate in character and used primarily for the purpose of handling interstate Commerce; and the order of the Commission as herein sued upon was void, and the Commission had no jurisdiction to enter the same or any other order as affecting the stoppage of said trains at any point, all of which was presented in defendant's motion for a new trial in the second ground thereof."

Petitioner states the same additional propositions under this assignment as those stated under the first assignment.

Your petitioner asks to have each of the four assignments above stated considered together, as they present in different form the same question, and we hope it will be deemed sufficient to here present statement, same to be considered under each of said four assignments.

Statement.

The fifth section of the agreed statement of facts, on which this case was tried, was as follows:

"That this defendant on the first day of August, 1911, and continuously since said date, has operated two passenger trains daily through Meridian in each direction, and all of which are scheduled to stop at said station, and same have been operated through said station on the following scheduled thereat: South-bound train No. 5 scheduled to arrive at Meridian at 10:38 A. M., South-bound train No. 11, scheduled to arrive at Meridian at 7:56 p. M., North-bound train No. 6 scheduled to arrive at Meridian at 5:25

148 p. m., and North-bound train No. 12 due to arrive at Meridian at 9:03 a. m., and that any destination that can be reached by trains Nos. 17 and 18 can likewise be reached by the use of trains Nos. 5, 6, 11 and 12, and that Meridian can likewise be so reached from any point. That the distance from Galveston to Fort Worth by way of the defendant company's line is 346 miles; that such distance by way of the Trinity & Brazos Valley Railway Company is 325 miles, and by way of the Houston & Texas Central Railway Company is 343 miles, and by way of the Missouri, Kansas & Texas Railway Company of Texas is 377 miles. That the distance between Houston and Fort Worth by way of the defendant company is 314 miles, and by way of the Trinity & Brazos Valley Railway Company is 283 miles, by the way of Houston & Texas Central is 286 miles and by way of the Missouri, Kansas and Texas is 328. That the distances between Galveston and Dallas over these lines of road are as follows: Gulf, Colorado and Santa Fe Railway Company, 393 miles, Trinity and Brazos Valley, 302 miles, Missouri, Kansas and Texas, 389 miles, Houston and Texas Central, 315 miles. That the distance between Houston and Dallas via these

lines of railway are as follows: Gulf, Colorado and Santa Fe 338 miles, Trinity and Brazos Valley 249 miles, Missouri, Kansas and Texas 339 miles, Houston and Texas Central 284 miles. That the distance from San Antonio to Fort Worth by way of the International and Great Northern and Gulf, Colorado and Santa Fe Companies is 323 miles, and by way of the Missouri, Kansas and Texas it is 278 miles. That the respective distances over these lines of road between said points are as follows: Via the Trinity & Brazos Valley and Missouri, Kansas and Texas to Kansas City it is 819 miles, via the Trinity & Brazos Valley and Rock Island, 928 miles; via the Houston & Texas Central and Frisco 872 miles; via the Missouri, Kansas & Texas, 844 miles, and via the Santa Fe, 951 miles. That the respective distances over these lines of
149 road between Houston and Kansas City are as follows: Via the Trinity & Brazos Valley and the Missouri, Kansas and Texas, 766 miles; via the Trinity & Brazos Valley and Rock Island, 875 miles; via the Houston & Texas Central and Frisco, 816 miles; via the Missouri, Kansas and Texas, 834 miles, and via the Santa Fe 920 miles. That there is a route and line of road between Galveston and Denver via the Trinity & Brazos Valley and Fort Worth & Denver City, a distance of 1127 miles, and via the Houston & Texas Central and Santa Fe, 1300 miles, and via the Santa Fe alone, 1303 miles. That the distances over these respective routes from Houston to Denver are as follows: Via the Trinity & Brazos Valley and Fort Worth & Denver City, 1074 miles, via the Houston & Texas Central and Santa Fe, 1244 miles, and via the Santa Fe alone, 1272 miles.

There are two routes and lines of road between San Antonio and Denver as follows: Via the International & Great Northern and Santa Fe, the distance is 1280 miles, and via the Missouri, Kansas & Texas and Fort Worth & Denver City, 1080 miles.

There are routes and lines of road between Galveston and Houston and Los Angeles as follows: Via the Santa Fe from Galveston to Los Angeles, 2356 miles; Houston to Los Angeles, 2325 miles. From Galveston to Los Angeles via the Southern Pacific lines the distance is 1696 miles, and from Houston to Los Angeles 1640 miles; and from Galveston to Los Angeles via the Trinity and Brazos Valley, Texas & Pacific, and Southern Pacific Lines 1750 miles and from Houston 1697 miles.

That there are the following routes and lines of road be-
150 tween Galveston and Houston and St. Louis: Via the International and Great Northern, Texas and Pacific, and Iron Mountain Route, 866 miles, and from Houston 816 miles; from Galveston via the Southern Pacific and Frisco Lines 1007 miles, and from Houston 951 miles; from Galveston via the Trinity & Brazos Valley and Missouri, Kansas and Texas Lines, 1069 miles, and from Houston, 1016 miles; from Galveston via the Missouri, Kansas & Texas lines, 1134 miles, and from Galveston, 1084 miles; from Galveston via the Gulf, Colorado and Santa Fe and Frisco lines, 1158 miles, and from Houston, 1127 miles.

That the distance from Kansas City to Chicago by way of the Santa Fe is 458 miles, and that the distance between St. Louis and Chicago via the Chicago & Alton Line is 283 miles.

The third paragraph of the agreed statement of facts, on which this case went to trial, was as follows:

"That on the 11th day of March 1912, the Railroad Commission of Texas, after notice having been theretofore duly given, and after a hearing upon said subject, at which defendant had appeared before said Railroad Commission of Texas, said Commission duly made and entered the following order, rule and regulation, to-wit:

"Office of the Railroad Commission of Texas.

Hearing No. 1248.

AUSTIN, TEXAS, March 11, 1912.

Meridian Petition to Stop Trains Nos. 17 and 18 on G., C. & S. F. Ry. Co.

"The above numbered and entitled cause having been called for hearing by the Railroad Commission of Texas on the 13th day of February, 1912, and the parties (petitioners and said Gulf, Colorado and Santa Fe Railway Company) appeared in pursuance of
151 previous notice duly given by the Commission, and the Commission having heard the evidence offered and the facts presented pertaining to the matters covered by the petition and notice aforesaid, and having duly considered the same, the Commission finds that meridian is the County seat of Bosque county, Texas, and is a regular station on the line of railroad of the Gulf, Colorado and Santa Fe Railway Company; that said Railway Company now runs and operates three trains carrying passengers each way daily over its said line and passing said station at Meridian and that two only of said trains, each way daily, stop at said station for the purpose of receiving and letting off passengers, and that one of said trains each way daily, to-wit, trains number 17 and 18, pass, but do not stop at said station at Meridian for the purpose of receiving and letting off passengers thereat, and that the trains which do stop at said station as aforesaid are inadequate and insufficient to accommodate the needs of the business at said station and for the proper accommodation of the traveling public.

"Therefore, by virtue of the authority conferred upon it by law, it is hereby ordered by the Railroad Commission of Texas, that from and after the 2nd day of April, 1912, the Gulf, Colorado and Santa Fe Railway Company be and it is hereby ordered and required to regularly and daily stop said trains number- 17 and 18 at said station at Meridian, the County seat of Bosque county, Texas, for a time sufficient to receive and let off passengers with safety at said station of Meridian.

"It is further ordered that a copy of this order be, by the Secre-

tary, immediately forwarded to said Railway Company for its information and observance.

"WILLIAM D. WILLIAMS,
JOHN L. WORTHAM,
Commissioners.

152 Attest:
E. R. McLEAN,
Secretary."

It is admitted that after the order of the Railroad Commission was entered as above, your petitioner put on two additional trains, one in each direction, and numbered 15 and 16, respectively, and each of which were scheduled to stop at the station of Meridian. The Court of Civil Appeals on motion for rehearing gave to us an additional finding of fact to the above effect.

K. S. HULL, Division Superintendent, testified as follows:

"Train No. 18 originates at Galveston, Regarding its destination, the connection is carried through to Chicago. The train is handled over the lines of the G. C. & S. F. road from Galveston to Purcell, 518 miles. Purcell is located in the State of Oklahoma. The Gulf, Colorado & Santa Fe connects at Purcell with the A. T. & S. F. road, and the A. T. & S. F. handles train No. 18 over its road North of Purcell. I think the same equipment is carried on through from Purcell to the North, except a sleeper that is carried from Galveston to Fort Worth on that train. The equipment of train No. 18 when it starts at Galveston consists of a mail-car, first and second-class coaches, and two sleepers; I think that is the regular equipment; sometimes during the summer months the train carries three sleepers. The Denver sleeper they deliver to the Fort Worth & Denver at Fort Worth during the summer months. Regarding the destination of the sleepers that are regularly carried on that train out of Galveston, one of them is destined to Fort Worth, and the other to Kansas City; I don't know whether the latter sleeper runs through to Chicago or not. So far as I know, the destination of the chair-car that starts out of Galveston in that train is Kansas City. That train carries through equipment running between Galveston and Kansas City. During the summer months, say beginning the first of June and up to the first of October of each year, that train carries another sleeper; twice a week it carries a Denver sleeper
153 from Galveston, delivered to the Fort Worth & Denver Railroad Company at Fort Worth, and I think part of the time during the summer months a Denver sleeper is carried every day; I am not positive of that, but I know we are now carrying the car twice a week. Train No. 18 runs through Somerville and Milano Junction. At Milano Junction it picks up a sleeper and a chair-car from the International & Great Northern, those cars originating at San Antonio and destined to Kansas City; we handle those cars over the Santa Fe rails from Milano Junction to Kansas City.

"Train No. 17 originates at Chicago; its destination is Galveston.

"The primary purpose intended to be subserved by trains Nos.

17 and 18 was to handle our through interstate business—through traffic. There is a great deal of competition for that business. The direct competitors of the Gulf, Colorado & Santa Fe road for this through business are the Missouri, Kansas & Texas, the Trinity & Brazos Valley, and the Southern Pacific Lines—the Houston & Texas Central. The business that originates at Galveston, Houston and San Antonio for which the Santa Fe is a competitor is business that can be handled by the other railroads I have named. The principal points in Colorado and California to which this interstate business is generally destined, and which points are reached by the Santa Fe rails, are, *are* Denver, Los Angeles and all California points that are reached by the A. T. & S. F.—all New Mexico and Colorado points. The other lines I have named have through service and there is competition between them and the Santa Fe for business destined to Kansas City, Chicago and St. Louis; the other Texas lines have through connection with other lines the same as we have with the A. T. & S. F. There is a through route to those points over the G., C. & S. F. and the A. T. & S. F., over the Trinity & Brazos Valley and its connections, over the H. & T. C. and its connections, and over the I. & G. N. and its connections.

154 "We handle the United States mail on trains Nos. 17 and 18, and there are certain regulations of the Postoffice Department with which we are compelled to comply. I understand that getting the United States mail contracts is competitive business; I suppose it is considered desirable business by the Santa Fe, as they bid for it, it is a matter of service and time. We handle our through mails on trains Nos. 17 and 18, and handle through baggage on those trains. We do not carry an express car South of Temple on those trains.

"In the agreed statement of facts it appears that there are three trains passing Meridian each way daily, which are named as trains Nos. 5, and 6, 11 and 12, and 17 and 18. We now operate eight through Meridian daily, four each way; six of those trains, three each way, stop at Meridian. The other two trains that now run through there that were not on at the time the agreed statement of facts was prepared are Nos. 15 and 16. With regard to whether any destination can be reached by the use of trains Nos. 15 and 16 and their connections that can be reached by trains Nos. 17 and 18, going North, No. 16 precedes No. 18 to Meridian about forty minutes, and gets to Cleburne about ten minutes ahead of it; anybody going North could take No. 16 out of Meridian. Going South, No. 17 precedes No. 16; therefore, passengers would have to take either No. 5 or No. 11. I have a time-table showing the time when Nos. 15 and 16 are due at Meridian. No. 15 is due there at 11:40 p. m. and No. 16 at 4:52 a. m. They are both night trains through Meridian. No 17 goes through Meridian at 11:20 p. m. That shows that there is a few minutes' difference in the arrival at Meridian of those two night trains, Nos. 15 and 17. Those are South-bound trains. No. 15 is scheduled to stop at Meridian. Referring to the North-bound trains, No. 16 is due at Meridian at 4:52 a. m. and No.

18 is due there at 5:25 a. m. No. 16 is scheduled to stop there on flag."

(S. of F. p. 11 L. 9 to p. 14, L 9..)

155 "The Northern Terminus of the Gulf, Colorado & Santa Fe Railway Company is Purcell, Oklahoma." (S. of F. p. 16, l. 3-4).

"The depot at Meridian is about a mile and a quarter or a mile and a half from the town. There is nothing much right around or near the depot there except some stock pens and a cotton platform and one or two small residences. I don't think there is any kind of business concern located anywhere near the depot there. I will say that it is a mile and a half, at least, from the depot to the court-house. I have been there several times. About one-half or one-third of the territory between the town and the depot is occupied by residences; the balance of it is in pasture and in cultivation, with a few residences scattered along. To some extent the territory between the Santa Fe depot and the town is occupied by agricultural enterprises.

"Prior to June first this year the G., C. & S. F. did not carry sleepers South of Cleburne on any of its trains except Nos. 17 and 18, on the main line going to Houston and Galveston. Nos. 11 and 12 now carry a sleeper to Waco which they used to drop at Fort Worth; that sleeper is now in the Waco service.

"Train No. 5 is shown in the Statement of Facts to be a Southbound train. That train runs between Kansas City and Galveston; it goes to Chicago, too. That train does not carry a sleeper South of Cleburne. The train that runs opposite No. 5 is No. 6; No. 6 is a Galveston and Chicago train; it does not carry any sleeper South of Cleburne, except homeseekers' sleepers, which are all special cars. The next train is No. 11; that train originates at Chicago and Kansas City, and it terminates at Temple. So far as the main line of the Santa Fe is concerned, that train brings the sleeper as far South as Fort Worth, I believe. Train No. 12, which runs opposite No. 11, originates at Temple and goes to Chicago.

156 It does not carry any sleeper out of Temple; I think it picks up a sleeper at Fort Worth, but I am not positive about that; it picks up the H. & T. C. sleeper. The H. & T. C. has no line North of Fort Worth, but it seeks the Colorado summer business, so they carry a Denver sleeper over their own rails out of Galveston to Fort Worth and deliver it to the Santa Fe there. My understanding is that that sleeper is carried out of Fort Worth on our train No. 12.

"Trains Nos. 17 and 18 carry sleepers out of and into Galveston and Houston, and they handle San Antonio business, as has been stated. Those are the only trains that carry sleeping car business South of Cleburne. Sleeping car business is generally through business." (S. of F. p. 17 l. 4—p. 18, l. 14).

"We do not have any slow trains on the main line but they do not all make a fast time as is made by No. 17 and 18. They are

scheduled faster than any other train on the main line." (S. of F. p. 20, l. 27-l. 30).

"Stopping train No. 18, North-bound, at Meridian would cause more delay than to No. 17, on account of the grade. We could not stop No. 18 there without ten minutes' delay. As to No. 17, it would not cause so much delay—probably four or five minutes.

No. 18 is scheduled at thirty-six miles an hour, and No. 17 at thirty-five. Now, we have to run sixty to sixty-five miles an hour to maintain the schedule, upon part of the distance. Upon part of the *district* they can't make over eighteen to twenty miles an hour, so to average thirty-six miles an hour they have to run at a high rate of speed down grade, and it is hard to make up any time; sometimes they pick up five minutes; ten minutes is as much as they can make up." (S. of F. P. 25, l. 1 to l. 12).

"The trains we stop at Meridian are both night and day trains, we offer facilities of going in and out of Meridian both day and night. Train No. 12, in the morning, gets to Meridian at
157 8:56 a. m., and a man can go to Fort Worth and Dallas and have three or four hours there and come back on No. 11 at 7:56 p. m. No. 6, North-bound, is due there at 5:30 p. m. No. 5 South-bound, is due there at 10:45 a. m., so we have four day trains and two night trains there now, including Nos. 15 and 16." (S. of F. p. 25, l. 24 to p. 26, l. 5).

Authorities under First, Second, Third, and Fourth Assignments.

Herndon vs. C. R. I. P. Ry. 218 U. S. 135;
Atlantic Coast Line *vs.* Wharton, 207 U. S. 328;
Illinois Central R. R. vs. Illinois, 163 U. S. 142;
C. C. C. & St. L. Ry. vs. Illinois, 177 U. S. 514;
Mississippi R. R. Commission vs. Illinois Central, 203 U. S., 335.

Fifth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain the fifth assignment of error presented in that court, which was as follows:

"The evidence in this case shows that no other train besides those which stop at Meridian is necessary for the accommodation of the traveling public thereat; and the judgment of the Court herein, as well as the order of the Railroad Commission in this cause, impose an unreasonable burden upon the defendant and requires of it an unnecessary service, and same is therefore an infringement of the private rights of the defendant company, all of which was presented in defendant's motion for a new trial in the tenth ground thereof."

Sixth Assignment of Error as a Proposition.

The Court oc Civil Appeals erred in overruling and failing to sustain the Sixth assignment of error presented in that Court, which was as follows:

"The evidence in this case shows affirmatively that the amount of business originating at and destined to Meridian does not and will not warrant the defendant in stopping any other, further or additional trains at that place, and does not warrant defendant
158 in stopping its trains Nos. 17 and 18 thereat; that any destination to be reached by either of said trains can be reached by other trains which are scheduled to stop thereat, and that as said trains are interstate trains, handling interstate commerce in sharp competition with other lines of railroad engaged in similar business, the statute of the State of Texas under which the order of the Railroad Commission was issued and the order of the Railroad Commission itself and the judgment of the Court rendered herein are unconstitutional and void and violative of paragraph 3, Section 8, of the Constitution of the United States, and same ought to be set aside, all of which was presented in defendant's motion for a new trial in the tenth ground thereof."

Your petitioner presents these two assignments together and likewise to have considered thereunder the same additional propositions which are stated under the first assignment.

Statement.

The sixth paragraph of the agreed statement of facts, on which this case was tried, was as follows:

"That there was sold at Meridian passenger tickets for the twelve months beginning with May, 1911, as follows:

	One way.	R. T.	Value.
May, 1911	435	298	685.23
June	435	290	674.88
July	525	502	883.11
August	557	292	1039.12
September	527	298	698.04
October	468	636	1094.31
November	480	204	848.64
December	530	248	822.36
159 January	324	84	396.97
February	298	121	468.80
March	358	195	732.60
April	454	166	662.33

That there was sold tickets destined for Meridian during the same period as follows:

To Meridian.

May	365	136	440.70
June	443	97	520.40
July	475	118	580.50
August	478	97	461.00
September	588	374	894.25
October	396	104	492.70

November	437	106	439.45
December	443	290	674.55
January	334	127	389.15
February	277	98	404.65
March	333	155	500.55
April	425	163	570.30

That during the same period there was sold tickets at the stations named as follows:

Station	Amount.	Station.	Amount
Alvin	29469.83	McGregor	22054.85
Bellville	12540.47	Rogers	20764.21
Caldwell	20847.56	Rosenberg	18750.73
Cameron	41141.07	Sealy	19930.75
Clifton	16729.20	Somerville	21809.18
Milano	14818.17	Wallis	9186.64

and that the population of said last named places as shown by the United States Census of 1910 was as follows:

	Station.	Amount.	Station.	Amount
160	Alvin	1453	Bellville	1250
	Caldwell	1476	Cameron	3263
Clifton		1137	Milano	500
Morgan		831	McGregor	1864
Rogers		1275	Rosenberg	1198
Sealy		2250	Somerville	2070
Wallis		1000		

"That defendant stops its trains Nos. 17 and 18 at those stations named below: At Alvin, Caldwell, Cameron, Clifton, Milano, Morgan, Rosenberg, Sealy, Somerville, Wallis."

George P. Robertson, a witness for the state, testified as follows:

"I live in Meridian, Texas. I am a lawyer by profession. I have lived in Meridian thirty-three years, and am pretty well acquainted with the people of Meridian. I would say that the population of Meridian is about 1500 at this time.

"I frequently have occasion to travel out of Meridian on the Gulf, Colorado & Santa Fe Railway. I have occasion to make trips to Galveston. When I want to go from Meridian to Galveston I want a sleeper; I want as good accomodations as they have. The best way the people of Meridian have to go South, and the way I go, is to go to Waco and there take the Houston & Texas Central; that is the best route. I can go to Waco and get a sleeper at 10 o'clock on the H. & T. C. and go through, and it is no trouble to go from Houston to Galveston any time of the day. To get a sleeper on the Santa Fe to Galveston, I have not tried it lately, but the only way I know of would be to go from Meridian to Temple and wait there for No. 17. In coming to Austin on this trip I left Meridian at 7.56 p. m.,

yesterday evening, and went to Waco, reaching there at 10 o'clock, and took a sleeper on the M. K. & T. leaving Waco at 11.20 p. m. The fare from Meridian to Austin over the Santa Fe is $4.00 while the fare from Meridian by way of Waco and the M. K. & T. to Austin is $4.85. If I could get the same accommodations on the Santa Fe as I do by way of Waco and the M. K. & T., I would come to
161 Austin over the Santa Fe in preference to the other route. If I leave Meridian at 7.58 p. m. and go to Temple I have to wait there for No. 17 on the Santa Fe or wait to catch a "Katy" train through there. Sometimes I come to Austin pretty often, and sometimes not so frequently. I know of a good many people that make trips to Austin from Meridian. As to how often I go to Galveston, I have been averaging about two trips a month. I know of other people that make the trip from Meridian to Galveston and return. Within my knowledge some of the citizens of Meridian make trips out of the state; I guess the number that make such trips would be about in proportion to the size of the town.

"I know now trains Nos. 15 and 16 operate through Meridian. Ever since trains Nos. 17 and 18 were put on until some time early last year, they had this rule, as I understood from what Mr. Keenan told me, and I found it worked: If I wanted to go South to Austin, San Antonio, Houston or Galveston, I would go over to the depot in time for the 5.25 p. m. train and buy a ticket to the point where I wanted to go, and that ticket carried me to Cleburne and there I would get on the South-bound train and go on. I used to travel that way a good deal. That arrangement is not in effect now, however. In order to catch No. 17 at Cleburne in the manner stated, I would have to leave home at 5.25 p. m., whereas, if train No. 17 stopped at Meridian I could catch it at 11.40 p. m. Going home on the return trip, if No. 18 stopped at Meridian I could get there at 5.20 a. m. or something like that; whereas, by stopping at Temple or Cleburne and taking the other train I get to Meridian at 8.56 a. m.

"People frequently go across the country from Meridian to Clifton in order to catch these fast trains, Nos. 17 and 18. It is thirteen miles by the dirt road from Meridian to Clifton; it is called twelve miles, but it registers thirteen. I have known of people destined for Meridian that would get off of these fast trains at Clifton and
162 drive across to Meridian; I don't know that I could give the number that do that, but it happens pretty often. In coming from Meridian to Austin on the slow trains, you have to lay over to make connections with the other roads, while the fast trains, Nos. 17 and 18, make direct connections.

"I have traveled North out of Meridian a good deal. No. 16 stops at Meridian when flagged and you can go to Cleburne on it, and there you have your choice of going on it or on No. 18. I think trains Nos. 15 and 16 have been running since the first of this year.

"We have a college located at Meridian. As to the average attendance at that college, that would be guess work on my part. I have seen the student body and observed them, and I would say that the average attendance is about two hundred. I would say that about one-third of the students are residents of Meridian, and about

two thirds are non-residents. As to how the non-resident students travel into and out of Meridian in coming to and leaving school, I believe about all of them come down the Santa Fe and then go out the Cotton Belt to McGregor, there are very few that do not go out that route.

"With regard to the stopping of trains Nos. 17 and 18 at Meridian on certain days in October and November, 1912, I did not know that those trains were stopping there during that time. On the first day of November I tried to leave Meridian on one of those trains, and could not, and tried to come back on one of them and could not. I left Meridian on the first day of November, and reached home on the morning of the 6th; I was in Houston on the 5th and went to Galveston. I wanted to come back home from Galveston on the 5th, and tried to get passage on No. 18. I tried to get passage on the fast trains both ways. When I left Meridian I asked the agent,
Mr. De Spain, about it; he lives right near me. I asked
163 him if there was any chance to go South on that train, No.
17, and he said 'No, I could not. While in Galveston on that trip I tried to get a ticket, and the agent told me, 'you can't go on that train—I can't sell you a ticket for that train.' The up-town office in Galveston is where I tried to get the ticket; that was a ticket office of the Santa Fe. I made inquiry among the citizens of Meridian to ascertain what per cent of them have learned the fact that trains Nos. 17 and 18 were stopping there during the months of October and November, 1912. My investigation of that matter was pretty thorough. I did not find any one that knew it. I am pretty sure that the railway company did not have an agent at the depot in the night time during that period. It occurs to me that there was but one man there at the depot from about the first of October until about Christmas; there was quite a space of time when there was only one man there.

"I know of some parties from Meridian that had been to Beaumont and wanted to return and had passage on these fast trains on the Santa Fe; they had to get off the train at Clifton; that was Mr. Standifer and his wife. That was about the 28th of November or first of December, last year. I saw the tickets they had; I have the tickets at home now. Their tickets read to Meridian. The fare from Meridian to Cleburne is $1.10.

"Cross-examination:

"I expect I travel more than anybody else in Meridian—that is, I have done so for the last ten of fifteen years, but have not traveled so much during the last year. The most of my traveling is not to Austin. I go down to Galveston more than I do anywhere else. I want to travel where they have the most accommodations on the route. With regard to which I regard as the greatest accommodation, to go over a route where I can go to bed at 10 o'clock or to go over a route where I could not go to bed before 12.30 o'clock, *there* would de-
pend upon whether the point I am starting from is at home
164 or away from home; if it is at home, I would prefer to stay at home as long as I can. If I am going from home on a trip I

would rather sit up at home until 12 o'clock and then catch the train than to go somewhere else and catch the train at 10 o'clock; that gives me all the sleep I care for, anyway, if I get to bed at 12 o'clock. However, I believe the average person would prefer the accommodations which allows him to go to bed at 10 o'clock to one that requires him to sit up until 12.30 to get to bed. If train No. 17 were to stop at Meridian and I wanted to go to Galveston on it, I could not possibly get to bed until its arrival, which is about 12.30 a. m. I can go to Waco, however, and take the "Katy" or the H. & T. C. or the I. & G. N., and take a sleeper; the H. & T. C. leaves at 11.20 p. m., but I don't know what time the I. & G. N. leaves, as I never did go on it. I do not think it would be a better accommodation to go to Waco and take a train ehere even if No. 17 stopped at Meridian. I do not say that just because I like to sit up late at night; there is another condition in it, which is that the Santa Fe equipment is better. The Santa Fe has the best equipment in the State, in my judgment, and I have been on all the railroads. I do not think it is a fact that you can reach any destination by using trains Nos. 15 and 16 and their connections that you can reach by using Nos. 17 and 18 and their connections; there is a difference in coming from Meridian to Austin. I do not know that the people of Meridian are kicking about not having a railroad into Austin. I do not know about the connections South; when I go South I do not make connections at Brenham, because I usually go out of Houston. Going North, No. 16 gets to Meridian some twenty or twenty-five minutes ahead of No. 18, and it gets into Cleburne ahead of No. 18, and at Cleburne a man has his choice; if he wants to get on No. 18 he can do so. Coming South, No. 15 passes Meridian within an hour of No. 17. No. 15
165 goes to Galveston, but you don't make the same connection going into Houston—at least, I never did; I have had to wait at Alvin some fifty or sixty minutes. With regard to coming to Austin from Meridian, of course Austin is not on the line of the Santa Fe, but we call it the Santa Fe because you don't have to change cars. I think the Santa Fe handles trains through Austin, because they advertise that they run trains from San Antonio, through service. I can get in a Santa Fe car at Meridian and ride in that car clear to San Antonio. I never did go to Kansas City, but understand that the cars that pass through Meridian go to Kansas City. Of course, Austin is not located on the line of the G. C. & S. F. Railway.

I mentioned some people that had to go through Meridian to Clifton on the fast train and double back to Meridian. I can't say whether that is part of the service or not. Moody is a good sized town. My understanding is that trains Nos. 17 and 18 do not stop at Moody, nor at McGregor. The conditions that apply at Meridian with regard to these two trains also apply at Moody, McGregor, Crawford and Valley Mills. I suppose a train that stops at every station would be termed a local train. I think it is true that nearly all of the trunk lines maintain certain trains which are called through trains, but my experience has been that they will flag those trains for passengers. I do not know that the H. & T. C. has a train

that leaves Houston at Midnight for Dallas and does not make any local stops at all; I have not been on it. I know that the M. K. & T. maintains a train called the "Katy Limited," which does not stop at all stations, but they will flag it for passengers. I can't say that they will flag that train at any station or every station; the only experience I have had with it has been at two places, at Lorena and at Leonard. It is a fact that the M. K. & T., the Santa Fe, the
166 H. & T. C. and the T. & B. V. are competitors; they all originate in Galveston and Houston and run to Dallas and Fort Worth, and they are competitors for business to points outside of Texas—that is, where they go to the same places. It is my theory, and I believe it is the way people generally look at it, that if a bunch of us wanted to go to Kansas City and we would talk about it, and I say "Boys, the best equipment is on this road and it is only a hundred miles farther," we would go that way. The railroad that can furnish to the passengers the best accommodations, route, and service generally gets the business, and I think it ought to.

"With reference to the college located at Meridian, it is a Methodist college or training school. Probably two-thirds of the pupils come there from Hamilton and Coryell counties, and in going home they go out the Cotton belt. I do not think it is any inconvenience to those pupils because trains Nos. 17 and 18 do not stop at Meridian. My understanding is that the trains on the Santa Fe and on the Cotton Belt do not make connection at Meridian. It may be that I am in error about that. Whenever I have to go to Hamilton or Coryell county, I go through in an automobile. Neither No. 17 nor No. 18 is scheduled to stop at McGregor. I did not know that trains Nos. 5 and 6 on the Santa Fe make close connections at McGregor for Waco.

"My estimate is that we have 1500 people in Meridian. The travel in and out of Meridian is not altogether local business. I think there is more travel in and out of Meridian than is the case with the average town of its size. Being the county seat, there is naturally more travel. I believe the travel at Meridian is larger than at Clifton. I have not seen a statement of the receipts of the company at Meridian and at Clifton. I do not know as a matter of fact that the receipts at Meridian are about half as large as
167 the receipts at Clifton. My statement was based upon the population. Valley Mills is a smaller place than Meridian. So far as I know, trains Nos. 17 and 18 do not stop at Valley Mills. As to whether I know that for the year ending May, 1913, the business at Valley Mills was better than at Meridian, I could not give you an estimate on that business, because that is something I have nothing in the world to do with. As to the passenger traffic at Clifton on Nos. 17 and 18, a large part of it properly belongs to Meridian, because it is carried back and forth by automobiles in order to use those trains. If the data shows that the passenger receipts at Meridian for the twelve months ending May, 1913, were $11,305.37 I think that looks pretty good. McGregor is larger than Meridian. I have never been to Moody, other than going through there, but I believe we have a larger population in Meridian than

Moody has. My judgment is that it is not fair to compare Meridian with Clifton, because Clifton has the greater facilities. Meridian has equal facilities with Moody, Valley Mills and McGregor, so far as trains Nos. 17 and 18 are concerned.

"Redirect examination:

"The depot at Meridian is in the corporation limits, but it is a mile and a quarter from the court house.

"When I leave Austin to return to Meridian, if I go in the day time, I can leave here on the I. & G. N. and Santa Fe at 10:20 a. m., I believe it is. If I want to make a night trip, the only way to get a sleeper is to take the sleeper here and go to Waco and take
168 the 7 o'clock Santa Fe train in the morning. The train from Austin gets to Waco about 3 or 4 o'clock in the morning." (S. of F. p. 32, l.20 to p. 40 l.24.)

D. J. Cutbirth, for the plaintiff, testified as follows:

"I live at Meridian, Texas. I am County Clerk of Bosque county, and have held that office since the 4th of December, 1902. I went to Meridian on the 3rd of December, 1902, and have lived there since.

"I have had occasion to take passage on Santa Fe trains Nos. 17 and 18, at different times. Since this suit started the company has put on two more trains. At the present time, in order to get the benefit of a sleeper you have to take another train and run up the road or down the road and wait for the fast train, which carries the sleeping car. You can take the train at Meridian at 7.56 in the evening and go to Clifton and wait there until 11.50 p. m. and catch the sleeper. We don't use any sleeper going North, because it goes through our town in the day time. If you want to catch the South-bound train North of Meridian you have to go to Cleburne. At the time this suit began, Nos. 15 and 16 were not running, and Nos. 17 and 18 both stopped at Morgan. Morgan is not a county seat town, but they stopped both trains there. People living in Meridian go to Morgan and to Clifton to catch these fast trains: I think I know that better than anybody else, because I own an automobile, and, being a public man, when my friends want to go to either place they call on me, and I take them. I have taken many people to those places. As long as they stopped the trains at Morgan, we went there. it is seven miles from Meridian to Clifton. Last Monday night I took a party to Clifton to catch the sleeper into Austin.

If you want to go to Dallas, and leave Meridian on the 8:56 a. m. train and come back on the 7:56 train, you have very little
169 time in Dallas. I have gone up there on that trip and stayed over for the reason that I didn't have time to transact the business I wanted to, and could not go back on No. 17, because they would not stop at Meridian. Leaving Meridian at 8.56 a. m. I think you get into Dallas about 1 p. m., and you have to leave there about 4 o'clock in order to get to Meridian at 7.56 p. m. Using the fast train, you could get into Dallas about 9 a. m. and leave there

about 7 p. m., giving you all day in Dallas. Fort Worth is a little nearer to Meridian, and the conditions are a little different, but not much.

"A number of times I have gone to Clifton and to Morgan to get people who had come in on those fast trains. Some time last Winter, in January or February, Mr. Odle and Mr. Edwards and others had been down to South-west Texas and they came in from San Antonio; they had tickets to Meridian, but they took them to Clifton ,and they phoned to me and I went after them." (S. of F. p. 41, l. 21 to p. 43, l. 5.)

"The addition of trains Nos. 15 and 16 has altered the conditions, so far as the local travel is concerned, but those trains do not help us so far as sleeping-car service is concerned; of course, we can sit up all night on those trains and go to any point we want to. When you catch a slow train and go to Clifton to catch a fast train I do not think they haul you there free. I have not ridden on the slow train over there to catch a fast train, because I run my automobile, but I have been told by several that they had to pay to go over there. Three or four years ago I went to Cleburne one time and doubled back, and they didn't charge me. I have never ridden on a pass on the Santa Fe road, and I have done more for the Santa Fe people than any other man in the town. Whenever anybody in Galveston wants anything they write me and get it. Personally, it don't make any difference to me; I am just giving the facts as they exist." (S. of F. p. 43 l. 25, to p. 44, l. 9.)

The official railway and hotel guide for August, 1912, shows that the population of Meridian was 718. (S. of F. 27.)

The passenger business of petitioner for the twelve months ending May, 1913, at the following named stations was:

Moody	$23,290.93	
McGregor	33,832.90	
Clifton	22,478.62	
Valley Mills	12,719.42	
Meridian	11,306.37	(S. of F. 28)

It appears without controversy and is admitted that after the order of the Railroad Commission was entered and before the trial of this case in the District Court of Travis county, and at all times up to and including the present, defendant had been operating an additional train each way through the station of Meridian, said train being numbered 15 and 16, and the schedule of said trains as well as the schedule of trains 17 and 18, which are the trains in controversy, is and was as follows:

No. 16 North-bound is due at Meridian at 4.52 a. m. and No. 18, also North-bound, and being one of the trains in controversy, passes Meridian at 5.25 a. m. or 33 minutes later. There is only a difference of about 10 minutes in the arrival time of each of these trains at Cleburne. No. 15, a south-bound train, is due at Meridian at 11.48 p. m. and No. 17, also a south-bound train and being one of the trains in controversy, passes Meridian at 11.20 p. m. or 28 minutes earlier. Any destination to be reached by the use of trains

Nos. 17 and 18 can be reached by the use of trains Nos. 15 and 16. (Testimony of Mr. Hull, p. 13, l.16 to p. 14, l.9).

The Court of Civil Appeals on motion for rehearing found as follows:

171 "In response to appellant's motion for additional findings of fact, we state that at the time of the trial it appeared that four trains per day were operated each way by appellant through Meridian, three of which were scheduled to stop thereat, but that trains Nos. 17 and 18 were not among those so scheduled and they did not in fact at any time stop in obedience to the order of the Railroad Commission."

Authorities.

We present the same authorities under these assignments as appear under the fourth assignment.

Seventh Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain the seventh assignment of error which was presented in that court, which was as follows:

"The Court erred in its conclusion of law No. 6 wherein it is found as a matter of law that the defendant has wilfully disobeyed the order of the Commission because not more than four trains carrying passengers each way pass Meridian. If the service afforded to the people of Meridian was adequate it then had the right to run interstate trains through said station without stopping although not more than four passenger trains daily were run each way."

Statement.

We present the same statement under this assignment as that appearing under the first, second, third, fourth, fifth and sixth assignments.

The sixth conclusion of law as found by the Court was as follows:

"Said defendant has willfully violated and disobeyed said order of the Railroad Commission of Texas by failing to stop its said trains Nos. 17 and 18 at the station of Meridian, as required by said order, there being not more than four trains carrying passen-

172 gers each way daily including said trains Nos. 17 and 18, there being 224 failures to stop said trains." (Tr. 47, l.24 to l.30)

Authorities.

The same authorities are presented herein as those which appear under the fourth assignment.

Eighth Assignment of Error as a Proposition.

"The Court of Civil Appeals erred in overruling and failing to sustain the eighth assignment in that court, together with the additional propositions thereunder, which were as follows:

"The Court erred in its conclusion of law No. 4 wherein it is held that the service afforded to the people of Meridian is not adequate and sufficient, inasmuch as no trains other than 17 and 18 have any sleeping car accommodations or facilities. This conclusion of law places a burden upon the defendant not warranted by any statute in this state and not warranted under the order of the Railroad Commission of Texas ordering the stopping of these trains at Meridian. This defendant is not required to furnish sleeping car accommodations to any community and the facts as to whether or not the service afforded to any place is adequate and sufficient may not even in part be determined by reference to the sleeping car accommodations furnished. Such a conclusion of law imposes a liability upon this defendant which is unwarranted and the Honorable Trial Court basing its judgment, as it does, upon such a conclusion erred."

"First Additional Proposition under Eighth Assignment.

"It is no part of the duty of a Railway Company to furnish sleeping-car accommodations on any of its trains. There is no law in this state which requires the same, nor is the Railroad Commission clothed with authority so to do. Wherefore, the question as to the inadequacy of train service at any given place may
173 not be determined even in part by the fact that such community is not provided with trains having sleeping-car accommodations."

"Second Additional Proposition under Eighth Assignment.

"The liability of the Railway Company herein cannot be determined, nor the rights of the people of Meridian affected by the fact that neither of the trains that stop at Meridian carry sleepers. The Railway Commission was without authority to require such accommodation and the fact that it was not furnished cannot be made the basis of any judgment herein."

The witness Cutbirth testified that the addition of trains Nos. 15 and 16 had changed the conditions at Meridian so far as local travel was concerned, but that those trains do not help them so far as sleeping car service is concerned. (S. of F. 43, 1.25 to 1.29).

The Fourth conclusion of law by the trial court was as follows:

"The other passenger trains provided by defendant outside of trains Nos. 17 and 18 were not and are not adequate and sufficient to accommodate the local and interstate passenger traffic on defendant's line of railway so far as the town of Meridian is concerned inasmuch as no trains other than Nos. 17 and 18 have any sleeping car accommodations or facilities." (Tr. p. 47, 1.14 to 1.19)

We also respectfully refer to the testimony appearing under the fourth assignment.

Authorities.

Ninth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain the ninth assignment presented in that court, together with the additional proposition thereunder, which was as follows:

174 "The order of the Railroad Commission of Texas on which this suit was predicated is and was void, and was without authority of law, for this, that the statute regulating the stopping of trains at county seats is and was mandatory, and no discretion relative thereto was lodged with the Railroad Commission, and whether or not the train service at Meridian was adequate, was an immaterial inquiry, and the finding of the Commission to the effect that the train service thereto was not adequate did not empower the Commission to enter the order that was entered, and on which suit herein was filed."

"First Additional Proposition under Ninth Assignment.

"The Statute has not clothed the Railroad Commission with any authority relative to the stopping of trains at county seat towns and the Commission is not authorized by law to make any order relative to railroad stopping trains at such places. If the statute in question was effective, the same was a positive demand as against the Railway Company and the prosecuting officers of the State were warranted in using such process as may be deemed necessary to secure the observance thereof, but no order of the Railroad Commission could effect this purpose or be made the basis of an action and as the judgment entered herein was based upon the order of the Railroad Commission which affected a subject beyond the power of the Commission, the same is and was void."

Statement.

We refer to the order of the Commission as same is set out under the fourth assignment.

It appears without controversy that the judgment entered in this case was for a violation of the order of the Railroad Commission and the conclusions of law and fact as found by the trial judge all show without controversy that the conviction was for a

175 violation of the order and such is the judgment that was affirmed by the Court of Civil Appeals, same being emphasized by the additional findings of fact made by the Court of Civil Appeals on motion for rehearing, wherein it appears that trains Nos. 17 and 18 were not at any time stopped in obedience to the order of the Railroad Commission. We do not deem it necessary to specifically refer to the line and page supporting the above statements as there is no controversy relative thereto.

Authorities.

Tenth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain the eleventh assignment presented in that court, which was as follows:

"The judgment entered herein is and was void as to the penalties assessed, for this, that the statute requires as many as four trains per day each way be stopped at all county seats, if so many are run, and the Railroad Commission of Texas was not clothed with the authority to file suit for penalties for the failure of a railway company to comply with said statute, and the District Court of Travis county to comply with said statute, and the District Court of Travis county was without power to assess a penalty for the violation of such statute."

Statement.

We refer to the statement appearing under the ninth assignment.

Authorities.

Eleventh Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain the twelfth assignment of error in that Court, which
176 was as follows:

"There is no statute in this state under which a penalty can be assessed against a railway company for its failure to stop any given number of trains at a county seat station, and the judgment of the District Court of Travis county awarding penalties on such a state of facts is and was without authority of law and void."

Statement.

No particular statement is deemed necessary under this assignment, as it is admitted that a penalty was assessed, because of the failure of the Railway Company to stop certain of its trains at a county seat station in disobedience of an order of the railroad Commission.

Authorities.

Revised Statutes, Articles 6672 and 6676.

Twelfth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain the fourteenth assignment of error as presented in that court, together with the proposition thereunder, which *were* as follows:

"The Court erred in rendering judgment herein for the plaintiff in the sum of $22,400.00 for the reason that if the defendant is

liable herein it is liable only for one violation, and only one penalty should have been assessed, all of which was presented in defendant's motion for a new trial in the seventh ground thereof."

First Additional Proposition under Twelfth Assignment.

"The statute, under which this penalty was assessed, does not allow a cumulative punishment, and if the defendant was liable for its failure to perform a duty enjoined upon it by law, and for such failure only one penalty may be collected and which may not exceed $5,000.00."

177 Statement.

It is admitted that judgment in the sum of $22,400.00 was entered. The Court found as a fact that there had been 224 violations of the order of the Commission by this defendant.

The findings of fact by the Trial Court affecting this subject are as follows:

"Forty-first. The period of time from April 2, 1912 to June 27, 1913 both dates inclusive, was composed of 452 days, including 64 Sundays and 388 week-days. During this period of time train number 17 stopped at Meridian on eleven days in October and November, 1912, & train number 18 stopped at Meridian 21 days in Oct. & Nov. 1912, under the conditions and circumstances stated in the fourth finding above. The period of time from January 9, 1913 to June 27, 1913, both dates inclusive, was composed of 146 week-days and 24 Sundays. On each of these days neither train 17 nor 18 stopped at Meridian, but on each of them train 15 stopped at Meridian and train 16 stopped at Meridian when flagged. That is to say trains 15 and 16 were so stopped at Meridian during the said period of time on 146 week-days.

"Excluding from the period of time between April 2, 1912, and June 27, 1913, both dates inclusive, the period of time elapsed between January 9, 1913, and June 27, 1913, train number 17 failed to stop at Meridian on 232 week-days, and train number 18 failed to stop at Meridian on 222 week-days.

"During the period of time covered by four months prior to January 9, 1913, 106 week-days and 15 Sundays intervened, one of which week-days was included in the days mentioned in finding five above. Excluding all the week-days for four months prior to January 9, 1913, and all the week-days between January 9, 1913, and June 27, 1913, both dates inclusive, train number 17 failed to stop at Meridian on 127 week-days, and train number 18
178 failed to stop at Meridian on 117 week-days.

"During the period of time covered by three months prior to January 9, 1913, thirteen Sundays and 78 week-days elapsed, excluding every week-day included in the period of time covered by three months prior to January 9, 1913, and every week-day since January 9, 1913, up to and including June 27, 1913, and excluding the days mentioned in finding five above, train number 17 failed to

stop at Meridian on 154 week-days between April 2, 1912, and June 27, 1913, and train number 18 failed to stop at Meridian on 144 week-days between April 2, 1912, and June 27, 1913. (Tr. pp. 42-43).

"Forty-second. The failure of the defendant to have each of trains 17 and 18 to stop at Meridian on each of the days when it did fail to stop between April 2, 1912, and June 27, 1913, was willful and intentional, and was an intentional and willful violation of the order of the Railroad Commission of Texas involved in this case, ordering a stoppage of each of said trains at said place. (Tr. pp. 43-44).

"Forty-third. The sum of $100.00 per day is a just and reasonable penalty to be imposed upon the defendant for its failure and refusal to stop each of said trains on each and every day on which it was its legal duty to stop the same at Meridian." (Tr. p. 44).

The seventh conclusion of law as filed by the Court was as follows:

"For each of said 224 violations of said order by said defendant in failing to stop said trains Nos. 17 and 18 at said town of Meridian, the county seat of Bosque county, as aforesaid, I have assessed a penalty of one hundred dollars, aggregating $22,400.00 and have entered judgment accordingly." (Tr. pp. 47-48).

Authorities.

Thirteenth Assignment of Error as a Proposition.

179 The Court of Civil Appeals erred in overruling and failing to sustain the fifteenth assignment of error presented in that court, which was as follows:

"The Court erred in rendering judgment herein in the sum of $22,400.00, for the reason that if the defendant is liable herein it cannot be assessed for two penalties for each day that it failed to stop its trains Nos. 17 and 18 at Meridian; and the judgment rendered herein is and does allow to the plaintiff a separate penalty for each train that failed to stop at Meridian for each day after the order of the Railroad Commission went into effect; and the Court erred in holding and concluding that the penalty statute under which this suit was maintained authorized the assessing of a penalty on that basis, all of which was pres-nted in defendant's motion for a new trial in the eighth ground thereof."

Statement.

We respectfully refer to the statement appearing under the twelfth assignment.

Authorities.

The same as those appearing under the Twelfth assignment.

Fourteenth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain the twentieth assignment of error presented in that court, and the propositions thereunder, which were as follows:

"The statute under which the fine assessed herein was imposed is unconstitutional and void, and the fine herein assessed is excessive and out of proportion to the offense committed, if any; and such fine is therefore violative of the Fourteenth Amendment to the Constitution of the United States, as well as of Section 13, Article
180 1, of the Constitution of Texas, in that said fine is cruel and an unusual penalty is thereby assessed. The judgment is excessive because this was and is a friendly law suit and because the Railroad Commission was and is not really seeking or asking to collect the penalties, but was and is seeking to test the authority of the Commission, all of which was presented in defendant's motion for new trial in the tenth ground thereof."

First Additional Proposition under Fourteenth Assignment.

The fine imposed herein was out of all reasonable proportion to the acts committed even if every contention of the State is correct. No such offense was committed that warrants the taking of the property of defendant as is decreed by this judgment.

Second Additional Proposition under Fourteenth Assignment.

"The fi/e herein imposed, being as it is unusual, cruel and excessive, is violative of the Constitution of the United States and of the State of Texas.

Third Additional Proposition under Fourteenth Assignment.

"If the interpretation placed upon the penalty statute under which this fine was assessed is correct then the statute is violative of the Constitution of the United States and of the Fourteenth Amendment thereof in that it takes defendant's property without due process of law."

181 Statement.

We do not deem any particular statement under this assignment necessary, as it is admitted that the Court interpreted the statute to authorize a fine for the failure of the defendant to stop each of the trains on each of the days the same failed *failed* to stop, and so interpreting the statute fined it $100.00 for each day it failed to stop, and in effect held that the Court had power to fine defendant $5,000.00 for each failure each day to stop.

Authorities.

Fifteenth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in holding that it was the duty of your petitioner under the law to stop at the station of Meridian four passenger trains daily, running each way, if so many were run, because there is no law requiring, and under the facts of this case it affirmatively appears that there is and was no necessity, public or otherwise, requiring so many trains to be stopped at that station, and the judgment of the Court of Civil Appeals affirming the judgment entered in the District Court of Travis county was an undue, harsh, unnecessary and arbitrary exercise of power, and thereby your petitioner was deprived of the privilege of managing its own business.

Sixteenth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in affirming the judgment entered herein and in holding that the two trains in question were subject to the jurisdiction or the Railroad Commission of Texas and that said Commission had the right and authority to make the order that was entered herein.

182 We present each of the above assignments together as they relate to the same subject. Each of same were presented in the motion for a rehearing in the Court of Civil Appeals.

Statement.

We do not deem it necessary to make any particular statement under either of the above assignments, as there is no dispute about any question of fact therein stated and each of them involves rather a question of law.

Authorities.

Seventeenth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain the thirteenth assignment presented in that court, together with the propositions thereunder, which were as follows:

"The court erred in entering judgment herein, awarding the State of Texas a writ of mandamus and mandatory injunction, requiring the defendant to stop its trains 17 and 18 at Meridian, for the reason that it affirmatively appears that by other trains which do stop at the station of Meridian adequate train service in all respects reasonable is afforded to the people of that community—such evidence showing, as it does, that three other trains in each direction are stopped at that station for the purpose of receiving and discharging passengers, all of which was presented in defendant's motion for a new trial in the fifth ground thereof."

First Additional Proposition under Seventeenth Assignment.

"No writ of mandamus or mandatory injunction was warranted under the facts of this case for the reason that the order of the Commission was void, and the Court was without authority to award affirmative relief based upon such void order. The statute did not give to the Commission authority to enter the order, and there
183 is no law in this State warranting the issuance of a mandatory injunction for refusal to comply with a void order of the Commission.

Second Additional Proposition under Seventeenth Assignment.

"Insofar as this case is concerned, it is immaterial whether or not the train service at Meridian at the time this suit was filed was adequate or not, because the evidence showing as it does that at the time of the trial of this case the service at that point was adequate the State was not entitled to a writ of mandamus or mandatory injunction."

Statement.

We respectfully refer to the statement which appears under the sixth assignment. The judgment in this case awarded to the State a mandatory injunction. (Tr. 19.)

Authorities.

Eighteenth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain the Seventeenth assignment presented in that court which was as follows:

"The court erred in its finding of fact No. 35, wherein it is stated that residents of Meridian who make trips to other states have no access to any through train of the class or equipment of Nos. 17 and 18. Such a finding of fact is directly contradicted by the agreed statement of facts in this case, by which agreed statement the state is bound, and there is no evidence in this record to sustain such a finding, but the evidence and agreed statement of facts clearly show that any destination which is reached by trains Nos. 17 and 18 can be reached by the use of the other trains which do stop at Meridian, and there is not a particle of evidence in the record to the effect that the equipment on the other trains is any different from that on trains 17 and 18 except that some of them do not afford Pullman car accommodation, but this accommodation is one not required of the defendant as a common carrier, nor are the people of Meridian or any other com-
184 munity entitled thereto from the defendant as a common carrier."

Statement.

The Court's thirty-fifth finding of fact was as follows:

"Many residents of Meridian and vicinity make trips to points in other states than the state of Texas and return. Exclusive of trains 17 and 18 these passengers have no access to any through train of the class or equipment of Nos. 17 and 18." (Tr. 41.)

We refer to the agreed statement of facts on this question, which is set out under the fourth assignment, and in which the state agreed that any destination which could be reached by the use of trains 17 and 18 could be reached by the use of other trains which do stop at Meridian.

Third Section.

Argument.

There are several questions presented by this record which appear to warrant most serious attention and we will, therefore, at the expense of being somewhat tedious undertake to present our views on the questions hereinafter suggested, the first of which is whether or not under the facts of this case the trains in question were subject to the order of the Railroad Commission, and we, therefore, now present our views on the several phases of this question, which are more or less dependent the one upon the other and which are made to appear in our First, Second, Third, Fourth, Fifth, Sixth, Seventh, Fifteenth and Sixteenth Assignments.

While presented in different form, the same general question arises under each of these assignments to a degree which we think will permit us to present our views at this place, thereby covering the several questions which are presented by these assignments and which are material to a proper determination of the issue involved.

185 At the time the Railroad Commission entered the order on which this suit was predicated, the defendant was operating three trains per day each way through Meridian, but only two of which each way were scheduled to stop at that station. At the time this case was tried, the defendant was operating four trains per day each way through the station of Meridian, three of which were scheduled to stop thereat.

Our defense, as appears under the above assignments, is predicated on the idea that the service afforded to the people of Meridian by the trains which are scheduled to stop at that station are reasonably sufficient to supply the needs of that community and to afford all of the train service necessary, and that the defendant may run other trains which are not scheduled to stop at Meridian or at any other particular place, and that it is not competent under such circumstances for the Legislature of Texas, or the Railroad Commission to dictate the number of trains that shall be required to stop at any point. We think it clearly established that where the local needs of any community are provided for by way of train service, that the Company providing such service may inaugurate

other and through trains, which it may not be required to stop at any particular station. Let us, therefore, in a brief way undertake to determine whether or not the train service to and from Meridian is sufficient for the needs of that community. It appears that northbound trains numbers 6, 12 and 16 are scheduled to stop at that station and southbound trains numbers 5, 11 and 15 are so scheduled. One desiring to go north from Meridian may do so at 9.03 in the morning, at 5.25 in the afternoon, or at 4.39 in the morning, there thus being two day and one night trains northbound scheduled to stop at that station. Going south, there is a train at 10.38 in the morning, 7 56 in the afternoon and 11.48 at night. The trains which are scheduled not to stop at Meridian and which are the trains involved in this suit, towit: numbers 17 and 18, the latter being
186 northbound and the former southbound, each pass Meridian in the night time and within less than an hour of the same time that trains numbers 15 and 16 pass said station, that is, northbound train No. 18 passes Meridian within the same hour that train No. 16 passes the latter being scheduled to stop, and southbound train No. 17 passes said station within the same hour that train No. 15 does, the latter being scheduled to stop.

You will find that many of the material facts in this case have been agreed to and it is quite important, we deem it, to direct your attention to the admission of state which is contained in the fifth paragraph of the agreed statement of facts, and which is to the effect that any destination that can be reached by trains 17 and 18 can likewise be reached by the use of trains 5, 6, 11 and 12 and that Meridian can likewise be so reached from any point. (S. of F. p. 5.)

We may add in this connection that since that agreement was made trains 15 and 16 have been put on and any destination desired may be reached by the use of those trains as well as by the others. We likewise call your particular attention to the fact that there is a difference of less than thirty minutes in the leaving or arrival to or from Meridian by the use of the night trains that are scheduled to stop there, and what would be the result if trains 17 and 18 were scheduled to stop? In other words, northbound train number 16 is scheduled to stop at Meridian at 4.39. Train No. 18 going north, which is one of the trains involved in this lawsuit, passes Meridian about 40 minutes later than that. Southbound train, number 15, is scheduled to stop at Meridian at 11.48 and train No. 17, which is involved in this lawsuit, passes said station a few minutes earlier. So that it appears that any destination to be reached by the use of trains 17 and 18 can be reached by the use of other trains and that too by trains which pass the station within an hour of the same time that the trains 17 & 18
187 pass. As a matter of fact, it is not lack of train facilities which is really the gist of this complaint but rather the fact that there are no Pullman accommodations on the night trains scheduled to stop at Meridian, and we will discuss that particular feature of this case under other assignments. The trial court concluded as a matter of law that the train service at Meridian was

inadequate for the reason that no sufficient Pullman car accommodations were provided.

The statements appearing under the fourth and sixth assignments show the character and extent of the business done at Meridian and likewise a similar statement of the business done at other stations. The purpose of these statements was to indicate that there could be no serious demand for further or additional train service at that station.

It is admitted that the two trains in question are interstate in character; that they carry the United States mail under contract with the Government; and it appears without conflict that they were put on for the primary purpose of taking care of the through business, by which is meant business destined to or originating at points in the North, East and West, and that there are a number of other railroads in competition with the defendant for this character of business; that it is necessary for the defendant to maintain a fast schedule, giving through service in order to successfully compete for this business. These trains primarily operate between Galveston and Kansas City, the equipment being delivered to and received from the Atchison, Topeka and Santa Fe Railway Company, its connecting lines, at Purcell, Oklahoma.

188 We think the evidence clearly demonstrates that the train service afforded to the town of Meridian is amply sufficient for all of the needs of that community and that a careful reading of the evidence of Messrs. Robertson and Cutbirth clearly shows that so far as train service itself is concerned Meridian has no proper complaint, and this is necessarily so because it appears without contradiction that anyone desiring to leave Meridian in the night time or to go to that place in the night time may do so, arriving and departing within the same hour that could be done if the trains in question were stopped. Hence, it appears that one of the questions to be determined in this connection is whether or not taking into consideration the size of the town and the business done, it is reasonable to require a railroad to stop two trains at such a place within an hour when the stopping of one will more than take care of the business.

We desire particularly to impress the fact that there is a train service through Meridian in the night time and by the use of trains which pass said station within 30 minutes of the time that trains 17 and 18 so pass. Hence it cannot be said that insofar as train service itself is concerned that the same was and is inadequate because no contenion is made that it is necessary that two trains should stop in Meridian each way during the night time. We want to impress the further fact that the court in assessing the penalty and in arriving at the number of days for which the Railway Company should be convicted excluded from consideration all of the period of time on which trains 15 and 16 are stopped at Meridian. In other words, after your petitioner put on trains 15 and 16 no fine was assessed against it because of the failure to stop trains 17 and 18 at that station. This was a finding in effect that the train ser-

vice afforded to the people of Meridian was sufficient and
189 adequate after trains 15 and 16 were put on. We therefore, have a finding that at the time of the trial of this case the train service at that station was adequate except on the theory that no pullman car accommodations were afforded to the people of Meridian, and it was only on this theory that judgment in favor of the state could have been rendered. We will under other sections of this argument present the question as to the right of the state to assess a penalty for the failure to afford pullman car accommodations and that feature is merely referred to in this section in order that the court may clearly understand the specific acts for which this railway company has been convicted, and the theory of the court as to the adequacy of train service. We have said that trains 17 and 18 were not subject to the order of the Railroad Commission because they are interstate trains and because by the use of other trains the needs of the people of that community were adequately cared for. The questions growing out of the assignments of error herein discussed have been before the Supreme Court of the United States in a number of cases. We will undertake now to refer to a few of them, which we think illustrate the views of the court and likewise that the Railroad Commission of Texas exceeded its authority in issuing the order herein complained of, and that the Court of Civil Appeals erred in sustaining the order.

We will endeavor in a brief way to present the cases cited as authority supra.

The case of Mississippi Railroad Commission vs. Illinois Central in all essentials seems to be directly in point and the facts were quite similar. The Railroad Commission ordered the Railway Company to stop two of its trains at the town of Magnolia, which was a place of about 1200 people, and a county seat town. The order of the Commission was enjoined on the general ground that ample
190 facilities had been provided for the town of Magnolia, and that the trains in question were interstate and not subject to the jurisdiction of the Commission. It likewise appeared that the Railway Company had a contract to carry the United States mail which was handled on these trains. There was a statute in Mississippi which required railroad companies to stop all of their passenger trains at county seats at the discretion of the Railroad Commission. There was also a statute which made it the duty of railroad companies to stop such of their passenger and freight trains at any depot as the business and public convenience required, and after reviewing the evidence the Supreme Court, speaking through Mr. Justice Peckham, held that the order was beyond the power of the Railroad Commission to make and that the subject was one over which the state could not legislate. We quote as follows:

"The order cannot be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes, as asserted. It is the question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such station. If the commission can order such a train to be stopped at a particular locality under such

circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined and the train turned from a through to a local one in Mississippi. The legislature of a state could not itself make such an order, and it cannot delegate the power to a commission to do so, in its discretion, when adequate facilities are otherwise furnished.

191 "The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between states, both of passengers and freight. A wholly unnecessary, even though a small, obstacle ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals. We by no means intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the State through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and after the wants of the residents within a state or locality through which the road passes have been adequately supplied, regard being had to all the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability of the road to successfully compete with its rivals in the transportation of interstate passengers and freight."

And in view of the evidence in the case at bar elicited by the court relative to the length of time it would take to stop one of these trains at Meridian we direct particular attention to that portion of the opinion above wherein the following appears: "The order can not be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes, as asserted. It is the question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such station."

192 The case of Herndon vs. Rock Island had its basis in a statute of Missouri which required railroad companies to establish depots at crossings of other railroads and to stop interstate trains there for the receipt and discharge or transfer of passengers. The enforcement of the act was enjoined by the Railway Company and in sustaining the injunction Mr. Justice Day announced the principle on which we herein rely as follows:

"The principle to be deduced from these cases is, that where a railroad company has already provided ample facilities for the adequate accommodation of the traveling public such as may be proper and reasonable at any given point, and operate interstate commerce trains, carrying passengers through the same places, at which interstate trains do not stop, a state regulation which requires the stopping of such interstate trains, in addition to ample facilities already provided, to the detriment and hindrance of interstate traffic, is an unlawful regulation and burden upon interstate commerce."

To the same effect is the holding in Atlantic Coast Line against Wharton and there the court laid down the general rule that "Any exercise of state authority in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution is obvious. It hence arises that any command of state, whether made directly or through the instrumentality of a Railroad Commission, which orders or the necessary effect of which is to order the stopping of an interstate train at a
193 named station or stations, if it directly regulates interstate commerce is void.

The case of C. C. C. & St. L. vs. Illinois was predicated upon a statute of that state, requiring all passenger trains to stop at county seats and an effect thereunder was made to stop what was known as the Knickerbocker Special in the city of Hillsboro. The case was defended by the Railway Company on the same ground as the one at bar, and in deciding against the contention of the state, Mr. Justice Brown, speaking for the Supreme Court, said: "The question broadly presented in this case is this:

"Whether a statute is valid which requires every passenger train, regardless of the number of such trains passing each way daily and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train designated especially for local traffic may stop at the same stations within a few minutes before or after the arrival of the train in question."

"It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might, in some cases, render it impossible for trunk lines running through the state of Illinois to compete with other lines running through states in which no such restrictions were applied.

If such passenger trains may be compelled to stop at county seats it is difficult to see why the legislature may not compel them to stop at every station—a requirement which would be prac-
194 tically destructive of through travel, where there were competing lines unhampered by such regulations. While, as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths or the excellence of their tables would insure them such share, if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed

to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this; the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it.

"With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the Court nor the tenor of the opinions are opposed to the principle we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable, and an infringement upon that provision of the Constitution which we have held requires that commerce between the States shall be free and unobstructed.

"We are of the opinion that the act in question is a direct burden upon interstate commerce, and the judgment of the Supreme Court of the State of Illinois must therefore be reversed, and the case remanded to that Court for further proceedings not incon-
195 sistent with this opinion."

The reasoning in that case is sustained by direct and positive evidence in this one. There, as here, an effort was made to require the stopping of a through train when it appeared that another train passing the station within a few minutes of the train not stopped did afford facilities for transportation, and there, as here, the question was presented as to the competition between carriers and the necessity of maintaining fast schedules for competitive business, and there it was decided that legislation which hampered this effort was an interference with and a burden upon Interstate Commerce. There it is specifically held that legislation which directed the stoppage of any given number of trains at a particular place without regard to its requirements or necessities was a burden upon Interstate Commerce, and, therefore, void.

It must be ever borne in mind that under the judgment of the District Court of Travis County, and from which this appeal was prosecuted, your petitioner was acquitted for all the time during which it has been stopping three trains per day each way at Meridian and by reason of such acquittal no conclusion can be reached save and except that the Court found that the stopping of three trains per day each way at Meridian was adequate service except that the Railway Company was obligated to furnish sleeping car accommodations at that station, but in so far as the train service itself is concerned, we are now before this court with a finding in our favor that the train service at Meridian was adequate at the time of the trial of this case and, of course, is now adequate because the same service is yet maintained. If the train service is and was adequate, then the Railway Company was warranted in running such additional trains without stopping same at Meridian as in its judgment was thought best, unless the statute requiring four trains each way to stop at County seats can be held to apply to interstate trains and unless further it is held that we were lawfully convicted because we were not furnishing sleeping quarters to people who
196 wanted to ride on our trains out of Meridian. We hope to be able to impress you with the fact, which we deem impor-

tant, that no judgment or fines was assessed against the Railway Company covering the period since three trains per day each way were being stopped at Meridian. The judgment specifies the occasions on which the fines were assessed and this carries with it a judgment of acquittal for the other dates named in plaintiff's petition.

There is in reality no dispute about the facts in this case and under the same we most seriously contend that the action of the State authorities in attempting to stop these two trains at Meridian and the judgment of the Honorable Court of Civil Appeals in affirming a judgment so requiring was without authority of law, was an undue restriction upon the rights of the Railway Company and a direct burden upon its interstate business.

We submit that if the Legislature may *be* statute say if as many as four trains are run they shall stop at county seats, that it may in each case where the railroad company puts on an additional train to accommodate intrastate travel, increase the number of trains required to stop at county seats, and by such process may make it practically impossible to run any train primarily for interstate traffic.

As illustrative of the unreasonable interference by this statute with the Interstate Commerce, the statute as construed, requires each train to stop at Meridian whether there is any occasion for it to stop or not, that is even through there be no person wishing to get on or off the train, and nothing to be taken off or put on—in other words the train must stop there just for the sake of stopping, without other effect than the loss of money to the railroad company and delay of its patrons.

(*b*) Was the Railway Company liable in this case on the finding that no pullman car accommodations were furnished at the station of Meridian? This is the question suggested under our
197 eighth assignment and thereon we present:

The duties of common carriers in this State are defined by law. The restrictions placed upon them are in the law. Likewise the powers of the Railroad Commission are defined by law, and as the question suggested under this assignment is the one which seemed to induce an affirmance of the judgment herein by the Court of Civil Appeals, we deem it proper to refer you to those provisions of the statute defining the duties of common carriers as to the questions here at issue as well as to those provisions outlining the powers of the Railroad Commission. We have said in this assignment as well as in the propositions thereunder and all of which has been emphasized by argument in the Court of Civil Appeals, that Railway Companies are not required to handle sleeping cars or to do else than provide adequate accommodations for train transportation and this we now desire to emphasize as on a determination of this question we think will hinge the judgment rendered by the Court of Civil Appeals.

Article 6562 of our statute is as follows:

"Every such corporation shall start and run their cars for the transpor-ation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, with- a

reasonable time previous thereto, offer or be offered for transportation at the place of starting and at junctions of other roads and at sidings and stopping places established for receiving and discharging way passengers and freights, and shall take, transport and discharge such passengers and property at, from, and to such places, on the due payment of the tolls, freight or fare legally authorized therefor. Failure on the part of railroad companies to comply with the requirements of this article, shall be deemed in abuse of their rights and privileges and subject to regulation and correction by the railroad commission."

198 Under that article railroads are required, among other things, to furnish sufficient accommodations for the transportation of all such passengers, etc., and its failure so to do may subject it to regulation and correction by the Commission. We ask you to note that the duty therein imposed is to furnish accommodations for transportation. Transportation means carriage and the Railroad Commission of Texas is authorized by that statute to see that accommodations for transportation are provided, but it is to be noted that there is no requirement to furnish accommodations by way of sleeping cars or anything else except transportation and the Railroad Commission is not authorized to regulate anything else except the accommodations therefor.

Article 6618 of our statute provides that the passenger fare upon all railroads shall be 3¢ per mile. This article, in other words, provides the remuneration to the Railway Company for the doing of that which is prescribed in Art. 6552, and it is a well known fact, of which this court we assume will take judicial notice that the payment of this fare does not entitle anyone to the accommodations provided in the sleeping car. Indeed, there is no statute in this State which attempts to regulate the charges on sleeping cars. As to that feature, however, we will refer later, but the point at this moment is that the statute prescribes a fare of 3¢ per mile for transportation and transportation is the requirement which may be enforced by the Railway Company. Aside from the power conferred upon the Railroad Commission by Article 6552, the Commission act itself and Art. 6654 of our statute thereunder empowers the Commission to adopt necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs and to prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in this State, but there is nothing in that article nor the subsequent sections conferring power upon the Railroad Commission which in any way authorizes it to regulate railroad

199 train service or the handling of pullman cars, or indeed to do the things which were done by the Commission in this case. The only authority that is anywhere conferred by law upon the Commission relative to train service is Article 6676 of the Statute and concerning which we will later present our views. As emphasizing the duty of a common carrier and following the line of thought above suggested, we also direct your attention to Articles 6750 of our statute which is one of the articles of what is commonly known as the Separate Coach Law, which law, as everybody knows, requires

common carriers to provide separate coaches or compartments for the accommodation of the white and negro races. It is not a requirement to furnish separate sleeping cars but separate coaches or compartments and the Article 6750 leaves it discretionary with railway companies as to whether or not they will haul sleeping cars, and allows them to so haul such cars for the exclusive convenience of either race. This article is of rather more than passing importance in connection with the above for the reason that it is a part of the legislative history of this State that efforts have been made to secure legislation regulating sleeping cars and providing the rates of fare thereon. In fact, at the same session of the Legislature at which the Separate Coach Law was passed a bill was pending to make sleeping cars common carriers and to regulate the charges thereon. This bill was defeated. The Separate Coach Law was enacted with the provision above stated incorporated therein. Wherefore, we are warranted in assuming, and that you will take notice thereof, that this State has refused to recognize sleeping cars as common carriers or require the handling thereof by Railway Companies.

It has frequently been decided that the Railroad Commission has no jurisdiction, power or authority not expressly given to it by the law of its creation, or such as is necessarily implied under the grant of authority given to it. It may do nothing except as it may be authorized by the Legislature. There is no inherent power in it.

We cannot do better in this connection than quote from the
200 Supreme Court of Oregon on this subject the opinion in Railroad Commission vs. O. R. & N. Co., 19 Pacific, 706 as it is so applicable and expresses in a few words the power conferred, wherein it is said:

"The jurisdiction of such Commission is not given by implication. Commissions of that character are mere creatures of the statute, and possess no power except what the statute expressly confers upon them. * * * It has for a very long time been considered a safer and better rule in determining the questions of jurisdiction of boards and officers exercising powers delegated to them by the Legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act. There is too strong a desire of the human heart to exercise authority, and too much of a disposition upon the part of those entrusted with it to extend it beyond the design for which, and the scope within which, it was intended it should be exercised, to leave the question of its extent to inference. Should it be so left, serious disturbances might arise, involving a conflict of jurisdiction, which would be highly detrimental to the community.

"It is not, it seems to me, requiring too much of the legislative branch of the Government to enact, when it creates a commission, and clothes it with important functions, that it shall define and specify the authority given it so clearly that no doubt would reasonably arise in the mind of the people as to its extent."

This Court has refused to extend the jurisdiction of the Railroad Commission or to allow unto it a power not specifically delegated by law as is exampled in Davis vs. Railway, 92 Texas, 64, as follows:

"No possible construction of the language of the article (Article 4584 G) can so explain it as to express within its terms authority for the Railroad Commission to interfere with or control the corporation in issuing certificates representing the stock subscribed for. If, without the consent of the shareholders, the Railroad Commission undertook to authorize or prohibit the issuing of the stock in
201 this company, or to annul such shares of stock, when once issued, it usurped authority not conferred upon it by the laws of the State, and its acts were null and void, and may be attacked in any proceeding wherein their validity is in question."

And in the case of Railway Company vs. the State, 401, the State of Alabama strenuously insisted upon powers being committed to its Railroad Commission by construction. The Supreme Court held that the Commission had no power except that plainly conferred by statute and refused to extend this power by con-truction. These cases are merely illustrative of the many upon this subject, but we will not tax your patience by further reference, as the principle announced above appears to be beyond controversy.

It was decided by the United States District Court at Dallas in the case of the Pullman Co. vs. the Railroad Commission of Texas that the Commission had no power to require railway companies to furnish a pullman car service and no power to fix the rate of charges thereon. The judgment of Judge Meek perpetuating the injunction against the Railroad Commission was affirmed by the Circuit Court of Appeals at New Orleans, since which time the Railroad Commission has not undertaken in so far as our advices go to regulate the handling of sleeping cars or to interfere with the service in any particular. That a sleeping car service is not a transportation service will undoubtedly be admitted.

The case of Duval vs. the Pullman Co., 62 Federal, 268 being a Texas case, holds that the Pullman Palace Car Co. was not engaged in the business of carrying passengers for hire. This court held in Pollock vs. Pullman Co., 69 Texas, 121, that the Sleeping Car Company could not be held liable as a common carrier and in the case of State of Texas vs. F. W. & D., 99 Tex., 34, it was held that the service rendered by the Pullman Company was not a transportation service and that the contract between the Railway Company and the Pullman Company did not in any way affect or tend to affect transportation or charges therefor.

All of these decisions point unerringly to that which seems to be stated positively by statute of this State,—that it is not the
202 duty of a railroad company to do other than furnish transportation facilities and that a sleeping car service is not regarded as a transportation service. If it is not regarded as a transportation service, then the question as to whether a given railroad is doing its duty at a particular station may not be judged by considering the question of sleeping car service on its trains.

Let us consider what is the power, if any, that was conferred upon the Commission by Article 6676. The entire article reads as follows:

"The terms, 'road', 'railroad,' 'railroad companies,' and, 'railroad corporations', as used herein, shall be taken to mean and embrace

all corporations, companies, individuals and associations of individuals, their lessees or receivers, appointed by any court whatsoever, that may now or hereafter own, operate, manage or control any railroad, or part of a railroad, in this state, and all such corporations, companies and associations of individuals, their lessees or receivers, as shall do the business of common carriers on any railroad in this state.

"1. The provisions of this chapter shall be construed to apply to and affect only the transportation of passengers, freight and cars between points within this state; and this chapter shall not apply to street railways nor suburban or belt lines of railways in or near cities and towns.

"2. It shall be the duty of the commissioners to see that, upon every railroad and branch of same carrying passengers for hire in this state, shall be run at least one train a day, Sundays excepted, upon which passengers shall be hauled, and the commission shall have no power to relax this provision, and shall further regulate passenger train service by requiring all passenger trains carrying passengers for hire to stop for a time sufficient to receive and let off passengers at such stations as may be designated by the commissioners; provided, that four trains each way, carrying passengers for hire, if so many are run daily, Sundays excepted, be required to stop as aforesaid at all county seat stations."

And here again we find specifically provided the duty
203 that is intended to be imposed on the carrier. It is to be noted especially that its provisions affect: (1) only common carriers; (2) It applies only to the transportation of passengers, freight and cars between points within this State; and (3) its only purpose is to regulate the running of trains upon which passengers shall be hauled. There is no reference i nthe statute to any character of service except transportation and no reference to any kind of a car except those in which the transportation is to be provided. The express statement as to what shall be done is in and of itself an exclusion of those other kinds of service not enumerated. So that, each time and in each article of the statute wherein the duties of common carriers are enumerated as affecting this question only transportation is referred to and facilities for providing it, and sleeping car service is entirely different from a transportation service, and, of course, the cars are separate and distinct. These are matters of such common knowledge that the courts will take notice thereof.

So that it will be observed that in the legislative mind and in the enactment of the laws of this State the distinction- between the sleeping car business and the transportation service of railroad companies have always been marked, broad, certain and unmistakable. It has never been abandoned but is steadily maintained throughout all the period of time that the Legislature has been dealing with the subject. The force of this is unmistakable and in the light of the legislative, executive and administrative construction no power should *not* be conferred upon the Railroad Commissions by the Courts unless a specific statute can be pointed to which is susceptible of no other construction and which undoubtedly confers the power upon

the Railroad Commission asserted in this case. In other words, this power should not be drawn to the Commission by the force of construction of any language, the meaning of which could be reasonably construed otherwise than as expressly conferring such power upon the Commission. This is important at the present time and place because the opinion of the Court of Civil Appeals ingrafts a
204 character of court-made law which the Legislature has refused to enact. The judgment of the Court of Civil Appeals is based entirely upon the proposition that the train service at Meridian was inadequate, not because sufficient trains were not stopped at that station, not because the facilities were not provided to haul all the passengers to and from that station who desired the service, but because no sleeping car was stopped at that station, and the failure to provide this accommodation is made the basis of the conviction. May we not, therefore, conclude that the court held that it was the duty of the Railway Company to provide sleeping car accommodations at Meridian and if such is the conclusion to be reached, are we not warranted in going further and saying that thereby a service is required that the Railway Company is not compelled to furnish in any event? Your petitioner was chartered to haul passengers and freight and not to furnish beds and yet because it runs trains to which are attached pullman cars, it is held that this facility must be provided at Meridian.

It is admitted that the Railroad Commission is not empowered to regulate the sleeping car business in and of itself, but the effort is made here to do indirectly that which it could not do directly because the judgment of affirmance, if permitted to stand, is a regulation of sleeping cars and this brings us to a consideration of another question which we believe to be potential and that is that the regulation of sleeping cars and the sleeping car business on interstate trains is controlled by the Interstate Commerce Act. (See section 1 of Act of Congress of 1906).

The handling of sleeping cars is an instrument of interstate commerce. Your petitioner is engaged in interstate commerce. There is a finding of fact by the Court of Civil Appeals that its line extends from Galveston, Texas to Purcell, Oklahoma. There is a further finding of fact that the two trains in question are interstate in character, and, of course, the pullmans attached thereto are engaged in an interstate movement.

205 The agreed statement of facts shows that these two trains are run in competition with other railroads, furnishing through service from points in Texas to points in the North and West. So that, there b-ing a finding of fact in this case that we are liable because these pullmans are not stopped at Meridian, we are at once confronted with the question that those particular cars are engaged in handling interstate commerce and that the regulation thereof is provided for in the Interstate Commerce Act.

It is not necessary for us to cite authorities to the effect that where Congress has covered a particular field that the legislation enacted by it is exclusive and the State regulation thereon, be it by legislation or of some administrative body or judgment of the court, is

absolutely im-perative and void. Express Co. vs. Croninger, 266 U. S., 491, and numerous other cases; that the pullman cars which were hauled on these trains are instrumentalities of interstate commerce within the meaning of the act regulating is so held by the Court of Civil Appeals in the case of M., K. & T. vs. State, 167 S. W. R., 822. It must be borne in mind all the while that we were acquitted of every charge made against us by the State in this proceeding except the failure to provide facilities to those entering our trains at Meridian to go to bed—a facility not recognized as a part of a transportation service and concerning which, and the regulation thereof, no power has ever been conferred upon the Railroad Commission of Texas or any other administrative body, but a facility that is not only recognized but regulated by the act of Congress familiarly known as the Hepburn Act, and being 34 Statute, 584; U. S. Comp. Statute, Supplement 1911, page 1284, and that this service may not be regulated by the State of Texas, we think has been clearly decided in a number of cases by the Supreme Court of the United States. We refer to Southern Railway vs. Reed, 222 U. S., 424; B. & O. Ry. vs. Interstate Commerce Commission, 221 U. S., 612; C., B. & Q. vs. Miller, 226 U. S., 513; U. S. vs. Union Stock Yards, 226 U. S., 286. So that, for this reason, the order of the Commission was void and, of course, was not vitalized
206 by the judgment of the Court of Civil Appeals. It has also been held by that court that regulation of the interstate business on sleeping cars had been confided to Congress and should not be interfered with in any respect by State legislation. Pullman Co. vs. Adams, 189 U. S., 420; Allen vs. Pullman Co., 191, U. S., 171.

We may concede that the Legislature of Texas has the authority (but has not exercised it) to require railroad companies to run sleeping cars for the accommodation of State passengers upon all trains necessary to serve the State traffic, but in so doing, it could not interfere with a train primarily set apart for interstate traffic. If the Legislature thought that sleeping car accom-odations were necessary, it could have required the local trains stopping at Meridian, for the accommodation of local traffic (which were held entirely sufficient, except they did not haul sleeping cars) to carry such sleeping cars. If it had so done, the Legislature could not have gone further and required the interstate trains to stop at Meridian.

The Commission cannot interfere with the Interstate Commerce Commission under the guise of regulating the sleeping car, a subject over which it has no jurisdiction.

The argument hereunder might with propriety, we believe, have been presented under the first seven assignments and we ask now that it be considered in connection with the argument thereunder. We think it has been pointed out that the order of the Commission, the findings of the Court of Civil Appeals as well as of the trial court were based upon the assumption that they imposed a burden upon the carrier not required by law and that the requirements of the statute as to the character of transportation which must be provided *of* a common carrier has thereunder been amended and

extended by court decree; but it is said by the Court of Civil Appeals that when a common carrier provides this accommodation to a part of the public it is required to furnish the same to all others, and that this failure so to do is a discrimination. In other
207 words, it is *it is* held to be a discrimination against Meridian when it is shown that a train on which is hauled pullman cars stops at one station and fails to stop at *that* station. This is a theory never presented in the hearing before the Commission, not considered by the trial court and in truth originated in the Court of Civil Appeals. The trial court found that the train facilities were not adequate because no sleeping car privileges were afforded there and the failure to do so was a failure to provide adequate service, but the Court of Civil Appeals has gone one better and held that we have violated the statute against unjust discrimination by failing to give that facility. Unjust discrimination is an offense that is defined by law. It is not a constructive offense and may not become one. It is the doing only of those things which are inhibited by law and nowhere in the statute defining this offense is any reference made to a train schedule, or to the difference in facilities afforded in train service at different stations. It is a maxim that before there may be a remedy there must be a right. In other words, there is no remedy for the doing of those things which do not invade some right. The rights and duties of railway companies are defined by law and as pertains to the infraction of those assumed offenses which are quasi criminal, it cannot be charged with failure of duty unless such duty has been defined by law or may be so fairly inferred from the statute as written as to really be a part of it. We have no law, as has been previously pointed out, requiring a railway company to provide sleeping car facilities or to haul sleeping cars or to do anything relative to passengers except to afford transportation facilities, which means only a seat.

Now, as it has no duty relative to sleeping cars, and may at least presumably haul these cars as its own judgment may suggest, how may it be guilty of a discrimination for the exercise of a discretion which is confided to it?

208 A discrimination cannot exist relative to a subject concerning which there is no duty. It is only where the law has said thou shalt or thou shalt not that can be made the basis of any discrimination, and especially is this true where that which is called a discrimination has not been so defined by law. We therefore, and in conclusion of this subject, present the following proposition: There being a duty imposed by law upon common carriers to provide adequate train service and there being no law imposing the duty on common carriers to haul sleeping cars or provide this facility on its trains and the railroad commission not being clothed with the power to require common carriers to provide sleeping cars on any of their trains, then it would seem that the question of adequacy of train service cannot be determined by reference to the sleeping car facilities furnished. In other words, the duty is imposed to provide adequate train service, which, however, is only a transportation service, and there being no duty to provide sleeping

car facilities then it could not have been in the mind of the law-making body that the question of adequacy of train service should or could be determined in any aspect by considering the question of sleeping car accommodations and as the railroad commission had no such power any judgment of a court so requiring is equally bad.

(c) Did the Railroad Commission of Texas have the power to issue any order requiring the stoppage of trains at County seat stations under the provisions of Art. 6676? This question is presented in our ninth, tenth, eleventh and twelfth assignments and thereunder we present: The article of the statute known as 6676 is copied in full in a former portion of this argument, and it is the one under which the authority was presumed to exist authorizing the issue of the order on which this suit was filed.

We have already discussed the power of the Railroad Commission and the principles of law which govern the duties of any administrative body created by statute, and it is, of course, needless
209 to go over the same again. Our position is that if it was the duty of this petitioner to stop these trains at Meridian, it was its duty by reason of a statute of this state so requiring and concerning which the Railroad Commission of Texas had been given no discretion. It may be well in this connection to direct your attention to the fact that we were not convicted for a violation of any law of this state. The trial court concluded as a fact that we had violated an order of the Railroad Commission, which order had been duly promulgated and throughout the opinion of the Court of Civil Appeals no reference is made to any character of violation except of the order of the Commission. The opinion practically concludes with the statement that the court did not err in adjudging penalties for the failure of the company to comply with the order of the Commission. Hence, we have not to deal with in this connection those other provisions of the penalty statute referring to violations of law, etc., but merely are we required to determine whether or not there should have been a conviction for a violation of the railroad Commission's order and if this may not be answered in the affirmative, then, of course, the entire judgment is void.

By reference to the entire Railroad Commission Act as well as the various acts affecting common carriers which have since been passed, it is to be noted that in each of them, where any duty is devolved upon the Railroad Commission relative thereto some express direction is given in the act, but in no act where a positive duty is imposed upon a railroad company and a penalty provided for its failure so to do is anything left to the di-rection of the Commission, and indeed there is no occasion that this should have been done. What would be the sense to tell a railroad company that it shall do a thing and then turn around in the next breath and direct the Railroad Commission to issue an order requiring it to do that thing or to even permit the Railroad Commission so to do? It is
210 provided in the article 6676 that the Railroad Commissioners shall see that at least one train a day carrying passengers for hire shall be run upon every railroad. There then is a duty imposed upon the Commission but it is one that requires no order

from the Commission to enforce, as we shall presently point out or attempt so to do.

The Commission is further empowered to require passenger trains to stop for a time sufficient to receive and let off passengers at such stations as may be designated by the Commission. Now a discretion is allowed to the Commission under that section. It might become necessary thereunder for the Commission to have a hearing to determine whether or not a certain station is one of those to be designatd, but those provisions do not directly affect the question at issue except merely as persuasive as to what was in the legislative mind. The closing clause in the article is a mandatory provision requiring that four trains each way shall be stopped at all county seat stations, if so many are run. This is a mandatory provision of the law and I would like here to inquire what there is or was relative thereto requiring an order of the Commission; if these trains were subject to the order, the Commission could not relax the provision? It would have availed the carrier nothing to have obtained an order permitting it to stop less than the number mentioned at that station. In fact, there is a statute demanding of the Railroad certain things in positive terms and if it is not obeyed the State through its law enforcement department should vindicate the statute.

It is said by the Court of Civil Appeals that the statute in question gives to the Railroad Commission the power to regulate passenger train service and clothed it with power in the present case to enter the order complained of. It is true that in this article, except as otherwise provided, the Commission is empowered to regulate passenger train service, but this provision is undoubtedly qualified in two respects: First, Railroads are required to run at least one train per day upon which its passengers can be hauled. The Railroad Commission is denied the right to relax that provision.

211 Would it benefit a railroad to get an order from the Commission exempting it from that requirement? Certainly not, and no order from the Commission relative to that provision would avail the carrier anything. Second, Railroads are required to stop at least four trains per day each way at all County seat stations, if so many shall be run. The Commission cannot relax that provision and to that extent it cannot regulate the passenger train service at county seat stations. There is nothing to regulate and no order from the Commission is necessary. If the Commission is empowered to regulate passenger train service at county seat stations where no more than four trains each way are run daily, then all that portion of the article after the word "provided" was useless because if it had been intended to clothe the Commission with any discretion on this subject, such discretion was stated in the prior portion of the article and the proviso becomes as nothing. A proviso in any statute is always a limitation, its purpose being to limit a general power which has previously been conferred and if the proviso in this statute is to be construed as delegating a discretion to the Commission or authorizing it to control the train schedule at county seat stations otherwise than is stated in the proviso, then it was a useless piece of legislation. There is a rule that the courts must give

effect to every portion of a statute where it can be done without violence and to interpret the proviso in this statute as was done by the Court of Civil Appeals fails to give effect to that portion of this statute; but it is said by the Court of Civil Appeals that under Article 6675 of our statute it is made the duty of the Commission to see that the laws are enforced, and that is true, such is made the duty of the Commission under that article, and which must be read in connection with Art. 6676, to see that the provisions of the chapter and all laws of the State concerning railroads are enforced and obeyed, but how is this to be done? The statute says that it must be done by seeing that all violations of the law are promptly
212 prosecuted by reporting the same to the Attorney-General or other officer charged with the enforcement of the laws. So that, while it is true that the Railroad Commission shall see that the laws are obeyed it is not given power to enter into a promiscuous career of entering orders ad libitum and having suits filed thereon, but by reporting the same to the Attorney-General, whose duty it is made under the laws of this State to file suits for enforcement of such laws. There is no power and no statute authorizing the Railroad Commission of Texas to enter an order concerning the violation of a positive statute. It may only enter orders on those things that are confided to its discretion and to this extent its duties are quasi judicial, but it is not warranted in having a hearing and entering an order concerning the violation of a mandatory provision of the law, and all that the Commission should have done in the instant case, if it felt that your petitioner was violating the county seat station train statute, was to call the same to the attention of the Attorney-General and request that he file suit to secure obedience to secure obedience to the law. It was either our duty to stop these trains at Meridian because of a mandate of the statute or it was not our duty at all to do so, and the entering of the order imposed no additional duty or responsibility against the carrier. If these trains were subject to that statute the liability was imposed by reason of the law and not by reason of the Railroad Commission's order. Will it be contended that the Commission could have exempted this railroad from the provisions of that statute by an order, and will an order of the Commission in such an instance be superior to an act of the Legislature? There are other duties imposed upon railroads by statute, which we will cite to illustrate the folly of an order of the Railroad Commission concerning the same.

Article 6669 makes it unlawful for railroads to be guilty of an extortion and provides the penalty. Can the Commission by an order reciting therein the terms of the statute and that the Railroad Company has been guilty of a violation thereof, subject it to a penalty of $5,000.00 for each act of extortion and however
213 numerous? We have a statute preventing unjust discriminations and defining what they shall be, and a penalty is imposed for a violation of that statute. Is the Commission authorized to hold a hearing and make an order reciting this statute and that it has been violated and cause suit to be filed thereon, and subject the Railway Company to additional penalties of $5,000.00 for

each act of discrimination? Likewise, we have statutes requiring railroads to maintain separate coaches, electric head lights, safety appliances, derailing switches, crossings at public high ways and various other things, all of which provide a penalty for the violation thereof and none of which statutes are written more positively than is the one now under discussion. Will it be said that it is the duty of the Railroad Commission to hold a hearing to see whether or not a railroad is maintaining electric head lights on its engines and issue an order that the statute has been violated and thereby subject it to the penalties imposed for a violation of an order of the Railroad Commission? Just as much discretion is given relative to one of these duties of a common carrier as the other and in none of them could the Railroad Commission either increase or diminish the responsibility of a carrier by holding a hearing relative to that statute, and if it is the duty of the Railroad Commission to report to the Attorney-General, as is provided in Art. 6675, that a certain railroad is violating the separate coach law or the head light law, it is equally its duty to so report that a railroad is failing to stop the number of trains required by statute at county seat stations. We do not believe for one moment that it can be held that a railroad could subject itself to the penalties imposed for a violation of an order of the Railroad Commission by failing to provide derailing switches as required by statute. It is the duty of the Commission to tell the Attorney-General that the derailing switch law is being violated and it is the duty of the Railroad Commission to tell the Attorney-General that * * * a railroad is not stopping its trains as required by law, but that is the sum and substance
214 of everything allowed by law to the Railroad Commission in either instance, and yet in this case the Commission held a hearing concerning something over which it had no jurisdiction insofar as entering an order was concerned, but because it assumed this jurisdiction and held the hearing and its order has not been complied with, your petitioner has been mulcted in damages which now amount to $25,000.00, not for a violation of the law but for a violation of an order of the Commission. Suppose the Railroad Commission had entered an order exempting your petitioner from the provisions of this statute as to the two trains in question, but suppose the Attorney-General had concluded that we were required to stop those trains at Meridian, would not the courts hold that the order of the Commission would have been no defense and that the Commission had not been clothed with any discretion. So that, we contend that if these trains were subject to the laws of this State; there could be no exemption from the requirement except by an amendment to the law. It seems perfectly apparent that the words "as aforesaid" used in the proviso to this article mean that such trains shall stop at these stations long enough to receive and let off passengers and nothing more.

At common law it is the duty of the railroad company to pay its debts. Can the Commission by reciting this duty in an order subject the railway company to a penalty for $5,000.00 for each day it shall fail to pay each of its debts, however numerous?

We think it was only the intention of the Legislature to authorize the Commission to make orders where the statute or common law is silent as to the duty, or where some further specification or definition is necessary to enforce the statutory or common law duty. If the Commission's power to make orders is as extensive as the Universe, then the Commission has power to repeal acts of the Legislature, and set aside decisions of courts by making orders.

If it is the intention of the Legislature that the Commission shall have the power to supplement the penalties prescribed by the Legislature, or to create penalties where the Lgislature does not
215 see fit to create penalties, for the violation of any specific requirement of the Legislature, where presumably the Legislature thought the writ of mandamus sufficient, then it will be the simplest procedure for the Commission to incorporate in one order, all of the statutes of the State pertaining to railroads, with a large share of the Common law added.

(*d*) Is the penalty provided for in Art. 6672 cumulative, or thereunder may only one penalty be assessed without reference to the period of violation? This question is presented under our Twelfth and Thirteenth assignments, to which reference is here made, and thereunder we present: So far as our reading has gone the particular statute in question has not previously been construed except by the opinion of the court of Civil Appeals in the case of State of Texas vs. the M. K. & T., which was decided some two weeks before the opinion in this case was rendered. The statute provides that where a railroad fails, neglects or refuses to obey any lawful requirement, order, judgment or decree made by the Railroad Commission of Texas for every such act of violation, it should pay to the State of Texas a penalty of not more than $5,000.00. Does that mean, as applied to the present case, that each time your petitioner fails to stop either of the trains at Meridian after the order of the Commission became effective, that it subjected itself to the amount of this penalty and was liable for each and every time, up to and including the trial, or may only one penalty be collected as for a violation of an order of the Railroad Commission? As has been decided in a number of cases and seems to be well recognized, penalty statutes are strictly construed and the benefit of every doubt should be indulged in favor of the defendant. (H. E. & W. T. Ry. Co. vs. Campbell, 91 Texas, 551; Schloss vs. A. T. & S. F. Ry. Co., 85 Texas, 601; G. C. & S. F. Ry. Co. vs. Dwyer, 84 Texas, 194), or, to quote from the opinion of Justice Brown in M. K. & T. vs. The State, 100 Texas, 420, as follows:

"It is a well established principle of statutory construction that penal statutes must be strictly construed in determining the liability of the person upon whom the penalty is imposed, and that the more severe the penalty and the more disastrous the consequences to the person subjected to the provisions of the statute,
216 the more rigid will be the construction of those provisions in favor of such person and against the enforcement of such law. A penal statute such as now before us must be couched in such explicit terms that the party upon whom it is to operate

may, with reasonable certainty, ascertain what the statute requires to be done and when it must be done, otherwise there would be no opportunity for a person charged with the duty to protect himself by the performance of it according to the law."

217 We quote from G., C. & S. F. vs. McCown, 26 S. W. R., 745, (writ of error denied by this court, 93 Texas, 684):

"We are of opinion that the motion for a rehearing should be granted, and that the couse should be dismissed, upon the ground that the statutory penalty is not recoverable, the bill of lading not showing the freight charges due. In our former opinion it was held that, the rate of freight per hundred weight being shown by the bill of lading, the weight of freight being ascertainable at any time, as an inherent quality of the freight itself, 'the freight charges' were shown by the bill of lading, within the meaning of the statute. Upon further consideration we are compelled to recede from this position. The statute authorizes the recovery of the penalty in case the railway company or its agents refuse to deliver to the owner or consignee any freight, goods, wares, and merchandise 'upon payment or tender of payment of the freight charges due as shown by the bill of lading.' Sayles' Civ. St. art. 4258*a*. The statute must be construed like any other criminal statute, and unless a defendant sued for the penalty comes strictly within its terms he cannot be an offender against it. The bill of lading, to come strictly within the terms of the statute, must show both the rate of freight and the number of pounds, in order to show the amount of freight charges due. The statement of the rate per hundred weight alone is not sufficient, as then the bill of lading does not show the freight charges due. It must contain both factors of the operation, or state in some manner the freight charges due. If it referred to anything else by which the amount of charges to be paid could be made certain, it would be sufficient. In this case the bill of lading contains only the rate per hundred weight. It may be that the number of pounds of freight was purposely omitted or erased, in order to evade the statute; still it must be held that the statute is not violated, and the penalty cannot be recovered. The reasoning of the Supreme Court of this State in the case of Schloss vs. Railway Co., 85 Tex. 601, 22 S. W., 1014, supports the same principle and leads to the same con-

218 clusion. The very question has been so decided by the Court of Civil Appeals for the fourth supreme judicial district, in the case of Railway Co. vs. Wood, 23 S. W., 744, and we think it was correctly decided."

The statute under consideration prescribes a penalty for every act of violation. An act necessarily means the doing of something and not refraining from the doing of something. One is action and the other is inaction. We refer your Honors to any standard dictionary. Failure to stop the trains at Meridian was not action but merely inaction. Therefore, it seems that there has been absolutely no act of violation of any order. Under the McCown and similar cases, we are justified in taking this position.

However, we have been disposed to treat failure to obey the order of the Commission as one act of violation thereof.

When the Commission makes one order or decree or judgment, there is but one order, decree or judgment to be obeyed, and the failure to obey such single order, judgment or decree, can constitute only one act of violation. Suppose a court of equity makes a decree for the payment of money. Every day that the defendant fails to pay the money is a failure to perform the decree. Regardless of the number of days which may expire, there is only one failure to perform the decree of the court, so, here, where the Commission has made an order requiring two trains of specified numbers to stop at Meridian, so long as the railway company did not stop the trains on each day, there was a failure or refusal to perform the order of the Commission. Regardless of the number of days which expired, there has been a failure to perform only one order of the Commission. If the statute had said that upon each day, or each time the Company should fail to perform an order of the Commission it should be liable for a separate penalty, there would be some reason in the court's opinion. Here, the statute only provides that
219 there should be a penalty for every such act of violation, and failure to obey a single order can constitute only one act of violation.

The defendant did by its inaction violate the order of the Commission, and it thereby violated only one order and subjected itself to only one penalty. It is held in this case that the State may enforce orders of the Railroad Commission by mandamus. Certainly $5,000.00 in a great majority of cases will more than amply compensate the state for the expense of enforcing any order by mandamus. Therefore, if the State is allowed a penalty of $5,000.00 in addition to writ of mandamus, it is reasonably sufficient in all respects to vindicate the dignity of the State and the law. This construction of the statute which allows a penalty of $5,000.00 on addition to the writ of mandamus, makes the statute reasonable. The other construction that the State may recover $5,000.00 each day for each separate and infinitesimal ingredient that may make up violation of the Commission's order is contrary to the spirit of the decisions of the Supreme Court of the United States hereinafter mentioned, if not contrary to the definite rulings therein made.

It seems reasonable to conclude that had it been the purpose of the Legislature to make time the essence of the offense, such intention would have been expressed.

While we have said that this statute has not, except as indicated, been construed, there are a number of other statutes providing penalties that have been passed upon. Gullege & Matthews vs. M. P. Ry. Co., 3 Wilson, 168 was a suit for an overcharge on freight. There had been several overcharges occurring at different times and the statute prescribed a penalty of $500.00 for an overcharge. The position was taken that this meant a penalty for each time there was an overcharge but that contention was overruled, the court holding that there could be only one reocvery for every overcharge
220 that occurred up to the time of the trial. Mr. Rorer in his work on railroads lays down the rule as follows:

"Where the law fixes rates of fare, the state having the right so

to do, and imposes a penalty for exacting excessive charges to be recovered by the person subjected to such charge, the right of action therefor accrues in his behalf as soon as such excessive rates are charged and received by the Company. Such action for the penalty is not given as a satisfaction to the party injured but is given as a punishment for the misconduct of the Company in violating the law to compensate the plaintiff for the expenses of the suit. Hence a recovery can be had but for one penalty by the same party for illegal exactions up to the time of commencing the action however often the illegal exaction may have been repeated unless the statute otherwise provides. The intention of the law is to prevent the wrong act of taking excessive rates and that the intent requires, though not so expressed, that each penalty incurred shall be sued for as it occurs, so that if the act be an oversight it may thereafter be guarded against by the carrier, and if from a misconstruction of the law the carrier may be undeceived by a judgment going against it and may cease to violate the statute. The penalties cannot be allowed to accummulate in favor of the same person and be then recovered collectively in one action therefor. But one penalty can be recovered for illegal takings occurring previous to the commencement of the suit." (First Rorer on Railroads, 576.)

That rule, it occurs to us, should apply in this instance. The penalty to be collected, as there said, is not given as a satisfaction to the State of Texas but as a punishment to compensate it for the expenses of the suit, and certainly if the State is right in this contention, the assessment of a penalty in the total sum of $5,000.00 would more than compensate the commonwealth for its expenses.

221 The case of Field vs. F. W. & D. R. R., 30 S. W. R., 255, grew out of three alleged acts of discrimination against the plaintiff in the handling of his shipments. The shipments were made on different dates and from different stations. The statute under which that case was prosecuted prohibited unjust discriminations and provided a penalty for any such in the sum of $5,000.00. The trial court sustained a general demurrer to the petition on the ground that the amount demanded was beyond the jurisdiction of the court and the Court of Civil Appeals at Ft. Worth held that although there were several violations complained of in one suit, although covering several different transactions, only the one penalty could be recovered.

We quote from Chief Justice Tarlton:

"The plaintiff's petition was not subject to general demurrer. It alleged substantially in the language of the statute the existence of the conditions giving rise to the acts of discrimination reprobated by the statute. The fact that three distinct acts of discrimination were declared upon did not as appellee contends indicate a claim for $500.00 for each act and hence beyond the jurisdiction of the County Court, but all of these acts were the source of but one claim for $500.00. No more could be recovered under the terms of the statute and no more was sought. While each act of discrimination might have been the source of a claim for a penalty in that amount had it been relied upon as a separate cause of action, yet when all of the

acts were embraced in one complaint the penalty sought was necessarily limited to $500.00."

The case of M. K. & T. vs. the State, 97 S. W. R., 724, grew out of the failure of the Railroad to maintain water closets at two points in Rains County for a period of twelve weeks. The penalty portion of the statute under which the prosecution was instituted provided: "That any railroad which fails, neglects or refuses to comply with the provisions of this act shall forfeit and pay the State of Texas the sum of $100.00 for each week it so fails or neglects." The lower court assessed a separate penalty for failing to provide these accommodations at each of the stations named but the
222 Court of Civil Appeals reversed this judgment and, under the rule requiring penalty statutes to be construed strictly, held that as there was no express provision warranting the assessment of the penalties for each station that the Company was liable for only one violation each week without regard to the number of stations.

There is a statute in New York providing a penalty for buying or selling or having in possession marked milk cans belonging to another and a penalty is imposed for every violation of the statute. The appellate division of the Supreme Court in construing this statute held that only one penalty could be recovered irrespective of the number of cans held by the defendant. (U. S. Condensed Milk Co. vs. Smith, 101 N. Y. Suppl., 129.) Under the provisions of an act to prevent extortion by railroad companies the same court held that only one penalty could be recovered by the same person against a railroad company for all acts of extortion committed prior to the commencement of the action (Fisher vs. N. Y. C. Ry., 46 N. Y., 644), and this is the same principle that was announced by the Circuit Court of Appeals of the U. S. in Standard Oil Co. vs. U. S., 164 Fed., 376, and all of which go back and have their origin in the principle announced by Lord Mansfield in the celebrated case of Crepps vs. Durden, the latter having been convicted under an act of Parliament providing that no tradesman or other person should do or exercise any worldly labor, piece of work or other ordinary calling on the Lord's day except works of necessity and charity. Lord Mansfield held that it was but one entire offense whether longer or shorter in point of duration, whether it consisted of but one or a number of particular acts, that the act of Parliament conveyed no idea that if a tailor sews on Lord's day that each stitch that he takes is a separate offense or that a shoe maker or carpenter works for different customers or different business on the same Sundays that those are so many separate and distinct offenses, or
223 that where the killing of a single hare is an offense that the killing of ten more on the same day would not multiply the offense or the penalty imposed by the statute for killing one.

It is to be recalled that the trial court held that we were liable under this statute for a separate penalty for each time each of the trains in question failed to stop at Meridian, and on most of the occasions each of the trains failed to stop on the same day, and we were, therefore, assessed a separate penalty as to such. This is covered by the 41st finding of fact in the trial court. And the Court

of Civil Appeals held that every failure to stop each of these trains constituted a complete, separate and distinct violation of the law, and thereby, as we believe, ingrafted upon this statute a liability that is not expressed therein. At best, it may be said that the statute in question *in* unfortunately drawn and because of which and of the uncertainty as to its meaning the defendant should be given the benefit of the doubt and that construction placed upon the statute which imposes the smallest burden upon the citizen. This is in accord with decisions we have recited as to the construction of penal statutes. It cannot be said that this article in clear and unmistakable terms imposes a penalty for each time a train fails to stop in accordance with an order of the Railroad Commission. The other construction, and the one we here now contend for, that only one order of the Railroad Commission was violated and that everything done would constitute only one offense up to the time the case was tried is equally as reasonable under the working of the statute, and, therefore, that construction should be given it. The State ought not to be allowed to speculate in penalties nor the citizen mulcted in unnecessary fines and penalties. At best, this was only a contest as to the power of the Commission, which contest the citizen ought to be allowed to make without incurring the extreme liability that has been herein imposed.

224 Penal statutes usually provide, as they should, in particular and express terms, the specific acts which would constitute a violation thereof, and nothing is left to conjecture. As emphasizing our position that this statute is uncertain at best and that really if the Legislature had intended to pass such an act as the court has decreed other and different language would have been used. We refer to the language of the act imposing a penalty for a violation of the separate coach law. That statute does not say that for such act of violation á given penalty shall be imposed as is here stated, but by Art. 6749 it is provided that each trip run with such train without separate coach or compartment shall be deemed a separate offense, thereby leaving nothing to conjecture. There is nothing to construe and are we not warranted when we consider the specific terms of that statute in saying that the Legislature did not intend to impose or have imposed the fines for a violation of the Railroad Commission order that was imposed in this case?

(*e*) Does the construction given to Art. 6672 by the Court of Civil Appeals render the statute obnoxious to the Fourteenth Amendment to the Constitution of the United States or to Section 13, Art. 1 of the Constitution of Texas? This is presented by our Fourteenth assignment of error and thereunder we present: If the construction placed upon this article by the Court of Civil Appeals is correct, then your petitioner could have been fined $10,000.00 a day for each day it failed to stop both of said trains at Meridian after the order of the Railroad Commission became effective, and if this is what the Legislature intended, then are not the fines which may be imposed so enormous as to deter a railroad from defending against a plain violation of its rights and would prevent it from attempting to seek redress against any wrong done by the Railroad Commission by virtue of an order, and if this is the effect of the statute then we

contend that the same is a taking of property without due
225 process of law and denies to the Railway Company the equal protection of the law guaranteed under the Constitution of the United States, and that such fine is so unusual, cruel and excessive as to violate the Constitution of this State. It has not been often necessary to raise a question of this kind growing out of a statute in Texas, but the theory has been discussed in several cases by the Federal Courts and particularly by the Supreme Court of the United States in Cotting vs. Kansas City Stock Yards, 183 U. S., 99, and ex parte Young, 209 U. S., 144, and in each of them the principle is announced that laws do not secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all of his property or subjects him to extravagant and unreasonable loss. It is said in the Cotting case and quoted with approval in ex parte Young that "it is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented, but when the Legislature in an effort to prevent any inquiry of the validity of a particular statute so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws." It is also held in these cases that a question of this kind is Federal in character. We direct your attention in connection with the question arising under this assignment also to Mercantile Trust Co. vs. T. & P., 51 Federal, 529; L. & N. R. R. vs. McChord, 103 Federal, 216; Consolidated Gas Co. vs. Mayer, 146 Federal, 150. Under the Court's construction of this statute, it could have assessed penalties
226 aggregating $2,240,000.00, and but for forgiving the defendant during the period when it stopped a third train at Meridian, though without a sleeper, could have assessed penalties aggregating $— during a period when defendant without any intention to violate any valid law, was standing upon its right as it believed it to exist, until such time as the court could determine the same.

Wherefore, your petitioner files this its application for writ of error and presents therewith a true copy thereof, to be deposited with the Clerk of said Court, as required by law, and it has likewise notified the Honorable Luther Nickels, Assistant Attorney General of Texas, as required by law.

Your petitioner asks that on consideration, its application for writ of error be granted; that upon hearing, cause be reversed as prayed for in its original brief.

Respectfully submitted,

TERRY, CAVIN & MILLS,
A. H. CULWELL,
Attorneys for Petitioner, Gulf, Colorado and Santa Fe Railway Company.

(Endorsed:) App. No. 9055. Gulf, Colorado & Santa Fe Ry. Co., Plaintiff in Error vs. The State of Texas, Defendant in Error. Petition for writ of Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Jul- 29, 1914. R. H. Connerly, Clerk. Filed in Supreme Court Aug. 25, 1914. F. T. Connerly, Clerk, by H. L. Clamp, Deputy.

227 Clerk's Office.

Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing ninety pages contain a true and correct copy of the original petition for writ of error, now on file in this office in App. No. 9055, Gulf, Colorado & Santa Fe Railway Company, Plaintiff in Error, vs. The State of Texas, Defendant in Error.

Witness my hand and the seal of said Court at the city of Austin, this the 10th day of April, A. D. 1916.

[SEAL.] F. T. CONNERLY,
Clerk Supreme Court.

(Endorsed:) Appl. No. 9055. G., C. & S. F. Ry. Co. vs. State of Texas. Certified copy of Original Petition for writ of error. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Apr. 11, 1916. R. H. Connerly, Clerk.

228 Application No. 9055.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

(From Travis County, Third District.)

Petition for Writ of Error.

The case concerns an order of the Railroad Commission, issued under the authority of Art. 6676, Revised Statutes, directing the plaintiff in error to stop certain of its trains at Meridian, the county seat of Bosque county, for a time sufficient to receive and let off passengers with safety, for the violation of which at the suit of the State penalties were adjusted against the company, such judgment being affirmed by the Court of Civil Appeals. 169 S. W. 385.

Conceding that the trains in question were interstate trains, it was found by the trial court, with the finding approved by the Court of Civil Appeals, that, independent of these trains, the railway facilities provided by the company for the service of the citizens of Meridian were not adequate. We are unable to say as a matter of

law that that conclusion was unwarranted. The case therefore falls within the established holding that the State may require the stoppage of interstate trains at a particular locality within its limits where the carrier has not otherwise provided proper and sufficient railway facilities for it.

The writ of error is refused.

NELSON PHILLIPS,
Chief Justice.

Opinion delivered January 12, 1916.

(Endorsed:) App. No. 9055. G. C. & S. F. Ry. Co. vs.
229 State of Texas. Opinion on application for writ of error—Refused. Filed in Supreme Court January 12, 1916. F. T. Connerly, Clerk, Mr. Chief Justice Phillips.

Clerk's Office.

Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing one page is a true and correct copy of the original opinion of this Court refusing a petition for writ of error in Gulf, Colorado & Santa Fe Railway Company, Plaintiff in Error, vs. The State of Texas, Defendant in Error, Application No. 9055, from Travis County, Third District, delivered January 12, 1916.

Witness my hand and the seal of said Court, this the 10th day of April, 1916.

[SEAL.] F. T. CONNERLY,
Clerk Supreme Court of Texas.

(Endorsed:) Appl. No. 9055. G., C. & S. F. Ry. Co. vs. State of Texas. Certified copy of opinion of the Supreme Court. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Tex., Apr. 11, 1916. R. H. Connerly, Clerk.

230 In the Supreme Court of Texas, January 12th, 1916.

G., C. & S. F. Ry. Co.
vs.
STATE OF TEXAS.

From Travis County, Third District.

This day came on to be heard the application of G., C. & S. F. Ry. Co. for a writ of error to the Court of Civil Appeals for the Third District and the same having been duly considered, it is ordered that said application be refused. That the applicant, G., C. & S. F. Ry. Co. and its sureties, H. O. Stein and Sealy Hutchings pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said court, this the 18 day of Jan'y A. D. 1916.

[SEAL.]

F. T. CONNERLY, *Clerk*,
By H. L. CLAMP, *Deputy*.

(Endorsed:) Application No. 9055. G., C. & S. F. Ry. Co. vs. State of Texas. Copy of Judgment in Supreme Court. Application for writ of error. Refused. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Tex., April 6th, 1916. R. H. Connerly, Clerk.

231 In the Supreme Court of Texas.

Mo. No. 3580; Application No. 9055.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
THE STATE OF TEXAS.

Motion for Rehearing on Application for Writ of Error.

Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Tex., Apr. 11, 1916. R. H. Connerly, Clerk.

A. H. Culwell, Terry, Cavin & Mills, Attorneys for Plaintiff in Error.

Filed in Supreme Court Jan'y 26, 1916. F. T. Connerly, Cl'k, by H. L. Clamp, Deputy.

In the Supreme Court of Texas.

Application No. 9055.

Motion for Rehearing on Application for Writ of Error.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Plaintiff in error respectfully asks leave to present this, its motion for rehearing on application for writ of error and suggests that in view of the written opinion of this court as to the reasons for its refusal to grant our application we feel warranted in directing the

particular attention of the court to two questions which are raised in our application, and both of which are questions of law arising on the record, and each of which appear- to be conclusive against the State. These questions are:

First. Were the facilities at Meridian adequate irrespective of the two trains in question; and

Second. Did the Railroad Commission of Texas have the right to enter the order commanding the stoppage of these trains at Meridian?

232 The refusal to grant our writ of error seems to be based upon the assumed findings of fact by the lower court that independent of these two trains the railway facilities provided by the Company for the service of the citizens of Meridian were not adequate. If there was such a finding of fact and evidence to sustain it, then we should not contend that it was the province of the Supreme Court to disturb the finding, but we are so thoroughly convinced that your Honors erred in reaching the conclusion that such was the finding of fact that we feel warranted in pressing the issue again. There, of course, is a finding that the facilities at Meridian irrespective of these trains was inadequate, but such finding was based upon the fact that none of the trains which stopped at Meridian carried sleeping cars. It could not in good conscience have been based upon any other theory for the reason that the record shows without dispute that there were trains passing Meridian within 30 minutes of the same time as the two trains in question, which did stop at Meridian, and it could not be contended by any court, as we believe, that under this state of fact it could be held to be necessary to stop the trains in question insofar as transportation facilities are concerned.

Again the trial court acquitted the Railway Company for all the time that it has been stopping the trains at Meridian, numbers 15 and 16.

The above facts are so important, as we deem it, that we ask that you give particular attention thereto before our application is finally overruled, assuming that it will be admitted: First, that the trial court did not assess any penalty against the defendant for the period of time that trains numbers 15 and 16 stopped at Meridian, these being the trains which pass that point within 30 minutes of the trains numbers 17 and 18, the trains in question, and there being, as there was, an affirmative finding of fact that the reason the facilities at Meridian were inadequate, because the trains which

233 did stop there were not provided with Pullman car accommodations, we have been convicted. Second, not for the failure to furnish adequate transportation facilities at Meridian but for the failure to provide sleeping car accommodations on trains which did stop at that point.

Whether there is any evidence to sustain a finding is a question of law and over which this court has jurisdiction, and we respectfully present that the trial court having found as it did that we were not subject to the penalties for the period of time that trains numbers 15 and 16 were stopped at Meridian and the judgment

being based, as it must have been, solely upon the proposition that the trains which did stop at Meridian did not carry sleepers, it is a question of law as to whether or not a railway company is required to furnish such facilities and whether or not the failure to do so may be considered in determining the question of adequacy of train service at a given station.

It is admitted that the two trains in question which we were ordered to stop at Meridian were interstate in character, and whether or not we may be required to stop them at a given station is a federal question and the issues should be determined under the rules of law announced by the Supreme Court of the United States, and that court does not accept the findings of fact of a state tribunal (G. N. Ry. Co. vs. Minn. 238 U. S. 340) in determining whether or not a railway company may be required to stop them at a given station. We have yet to see a case wherein the failure to provide sleeping car accommodations on a passenger train has even been considered in determining the adequacy of train service. Railway companies are not required to furnish such facilities and there is no statute in this state regulating sleeping car service, nor has the Railroad Commission of Texas undertaken to do so. The order of the Railroad Commission in this very case made no reference to such service. We were merely ordered to stop trains 17 and 18 at Meridian. This order was entered before trains 15 and 16 were put on. After the latter trains were put on, and which was before the trial of this case, there was a finding in effect that the train service since those trains were put on was adequate. This because
234 we were only convicted for the period antedating this additional service. If a railroad cannot be required to furnish sleeping car service at all, if it is purely optional with it whether it runs sleepers or not, then pray tell us how the adequacy of its train service can be determined by the sleeping car facilities furnished thereon? But that is exactly what's been done in this case. If by any stretch of the imagination it could be said that to furnish Pullman car accommodations to one town and not to do so at another was a discrimination, then we reply that so far as this case is concerned we were not charged with a discrimination nor were we convicted of one. The penalty for discrimination under our statute could not be more than $5,000.00 hence the question of discrimination was not involved in this litigation. If the trains which were scheduled to stop at Meridian at the time this case was tried were deemed adequate and such was really the finding of fact of the trial court insofar as transportation is concerned, then notwithstanding our statute and the order of the Railroad Commission, the defendant was entitled to a judgment because the trains in question were interstate in character and not subject to regulation either by our statute or order of this Commission.

The opinion written by this Court in overruling our application for writ of error establishes the law to be in Texas that a Railway Company may be required to furnish sleeping car service and not only this but that the adequacy of the train service at any given station may be determined by the quality and quantity of sleeping

car service provided. In other words, Railway Companies under the opinion written are no longer in the transportation business alone. They no longer may confine themselves to the business for which they were chartered and are authorized under our Constitution and statute to conduct a carrier's business, but the courts as per this opinion ingraft upon them the additional obligation of providing a sleeping car service, in order to avoid the penalties for failure to provide an adequate train service. While the above may seem
a bold statement, yet it cannot be otherwise because as
235 previously stated herein no court can consistently hold, as
we believe, either as a matter of fact or law, that the train service at Meridian itself was inadequate because of the failure to stop trains 17 and 18 thereat. To illustrate, the train 17 which was ordered to be stopped passes through Meridian at 11:20 at night. The train 15 is due to stop at Meridian at 11:48 at night, or within 28 minutes of the time the other passes that station. This is and of itself should be sufficient to indicate that insofar as train service is concerned Meridian has the same advantage as other places save and except the sleeping car facilities, and in addition to this the trial court by its fourth conclusion of law found as follows:

"The other passenger trains provided by defendant outside of trains numbers 17 and 18 were not and are not adequate and sufficient to accommodate the local and interstate passenger traffic on defendant's line of railway, so far as the town of Meridian is concerned, inasmuch as no trains other than numbers 17 and 18 have any sleeping car accommodations or facilities." (Tr. p. 47.)

and the trial court acquitted the defendant after the time that it started its trains numbers 15 and 16, so that however bold our statements as above may appear, we do not think any other construction can be placed upon the announcement as contained in your opinion, and that it was not your purpose to so hold we are more than persuaded. Hence, we most earnestly invite a reconsideration of this question, which is raised especially by our eighth assignment of error and propositions thereunder. Please see printed application for writ of error, pages 35 and 36, with the argument thereon beginning on page 60.

We direct your attention to some of the conclusions reached by the Supreme Court of the United States in Great Northe-n Railway vs. Minnesota, 238 U. S. 340, wherein was involved the question as to the power of a Railroad Commission to require a carrier to erect weighing scales at stations. The following taken therefrom would seem to be pertinent as bearing on the question at issue:

"The business of a railroad is transportation and to supply
236 the public with conveniences not connected therewith is no
part of its ordinary duty * * * the demands upon a carrier which lawfully may be made are limited by its duty."

"It by no means follows simply because a railroad voluntarily supplies a convenience at some station which attracts trade that it can be commanded positively to do likewise at other places along the line. A railroad's possessions are subject to its public duty, but

beyond this and within charter limits like other owners of private property, it may control its own affairs."

Providing the conveniences of a Pullman sleeper is not a matter of transportation, and because these conveniences are supplied at some stations does not obligate the carrier to supply them at others because it has no public duty to perform relative thereto, and it necessarily follows that a discrimination cannot be charged based upon the failure to supply these conveniences.

As the Company was acquitted insofar as the assessment of penalties are concerned for all time, since it had operated through and stopped trains numbers 15 and 16 at Meridian, the conclusion is necessarily forced that the train service with these trains stopping at Meridian was considered adequate and yet the anomaly is presented that the judgment of the court requires us to stop trains numbers 17 and 18 at Meridian because they are the only trains on which Pullman service may be provided to the inhabitants of Meridian. We are thus confronted with the proposition of having been acquitted of failure to provide adequate train service at Meridian, and yet ordered to stop two other trains at that station so that the people thereat may have access to pullman cars. Our position thereon as herein stated, is that the failure to provide Pullman car accommodations may not in law be made the test of adequacy of train service. In this connection, we desire to impress upon your Honor-, as was the conclusion in some of the cases decided by the Supreme Court of the United States that even *if* it should be held
237 that the people of a given community were entitled to a particular facility that is afforded to other communities, the remedy of the State is to require that these facilities be provided on trains that are scheduled to stop at that particular station rather than to require that other trains be forced to stop at that station. In other words, if it should be concluded, which we deny, that we may be compelled to provide sleeping car accommodations to the people of Meridian, that we should be given the privilege of providing these accommodations on trains that are scheduled to stop thereat rather than to require the stoppage of other and interstate trains.

Second. We have questioned by our ninth and tenth assignments of error (Printed Record, pages 37 and 38) the right of the Railroad Commission to enter any order under the facts of this case and necessarily of the right to recover for refusal to obey the order. The State in one breath takes the position that under the statute no discretion is allowed, but that four trains per day each way, if so many are run, must be stopped at county seat towns, and in the next breath that these trains should be stopped at Meridian because they think train service at that station is inadequate, the question of adequacy being determined by the failure to provide Pullman car accommodations at Meridian. We have expressed ourselves as to the latter of this dilemma in the discussion just above and as to the question raised and growing out of the statute, Article 6676, while no reference to our assignments thereon is made in the opinion overruling our application, we think the question of sufficient importance to ask you to go into it again. Bear in mind that the Railway Com-

pany was sued for failing to comply with an order of the Railroad Commission and judgment was recovered for failure to comply with an order of the Railroad Commission. It will be admitted that if the order of the Commission was void or if it made an order on a subject concerning which it had not been empowered, then the judgment is not enforcible. Also that the Railroad Commission
238 of Texas has no power except that which is conferred upon it by statute. It has no inherent power and may only do those things *covering* which there has been a delegation of power, and this action being penal in nature there will be no presumption that the power was granted. The article of the statute in question does confer some power upon the Railroad Commission, but that power is given directly, for instance, it is the duty of the Commissioners to see that one train a day is run upon each railroad and the Commission is specially directed that that provision cannot be relaxed. The Commission is further authorized to regulate passenger service by requiring trains carrying passengers to stop for a time sufficient to receive and let off passengers at such stations as may be designated by the Commissioners, but when the statute speaks or deals with train service at county seat stations an entirely different situation is presented, for as to such stations no discretion is lodged with the Commission and no power is given to it, but the di-rection is rather to the Railway Companies themselves, as they are required to stop at such stations four trains each way carrying passengers if so many are run. This provision is mandatory. Indeed, it is just as mandatory as the article of the statute which requires a carrier to deliver freights to a consignee upon the payment of the due tolls and charges. Will it be assumed that if a Railway Company refuse to so deliver freight to any consignee that its liability would be increased merely because the Railroad Commission entered an order requiring it to deliver such freight, and would the cause of action be based upon the order of the Commission or upon the failure of the Railway Company to comply with the statutory duty and in such case could the amount of penalty to be recovered be increased merely because the Railroad Commission had seen fit to enter an order?

The Attorney General of Texas is its law officer and as such is charged with the duty to see that the laws are obeyed. He is the administrator of the statute law. The Railroad Commission of Texas is largely an inquisitorial body and may enter orders
239 after investigation, concerning those questions of which it may inquire, and concerning which some discretion has been lodged in it, but such Railroad Commission is not charged with the duty of entering orders relative to positive statutes. If the defendant Company failed in a duty as to stopping trains at Meridian, it failed in the statutory duty, and concerning which the Railroad Commission is given no discretion, and of which it is not the law enforcement officer. It may, of course, report violations of the law, but the violations so reported are as to statute law and not as to its orders, in so far as statutes are concerned. The citizen yet has some rights. H-'s charged with knowledge of the statute law. He's charged with knowledge of consequences of violation of the statute law, but unless

some inquisitorial body, such as a Commission, has been directly given authority to direct the citizen, the punishment cannot be increased because such body assumes to give a direction by way of order. This Railway Company knew that there was a statute requiring four trains to be stopped at county seat stations, because such is written in the law, but it was not charged with knowing that it could be mulched in heavier penalties for failing to comply merely because an order was issued by a Railroad Commission. Suppose the Commission had exempted the defendant from stopping its trains 17 and 18 at Meridian, this would not have been binding upon the Attorney-General, and he could have filed suit for the failure and totally ignored the order of the Commission, and had it been held liable in such suit, the penalty would have been fixed under the statute, but, of course, it could not have been in such amount as was entered for a violation of the Railroad Commission's order.

The rights and remedies of the Government as well as the duty of the citizen must be certain, but if the rule is to be established that the Railroad Commission of Texas may enter an order affecting the statutory duties of railroads, then the whole scheme of our
240 laws pertaining to transportation companies, *are* uncertain and chaotic. There is nothing uncertain about the statute in question and necessarily no order thereon was necessary. These trains were either subject to it or not subject to it, and that issue could be determined in the courts of the country without reference to the Railroad Commission.

We earnestly request that further consideration be given to the assignments raising this question.

Third. We respectfully urge a reconsideration of our contention (application, pages 79 to 87), that under the proper construction of the statute as applied to this case, that even if the Commission had power to make the order, that only one penalty could be recovered, especially as such construction of the statute would render it reasonable, while the other construction that a penalty could be recovered of $5,000.00 for the failure to stop each train each day, or a total penalty of $10,000.00 per day would render the statute obnoxious to the due process clause of the 14th amendment of the Federal Constitution.

In this connection, we call attention to the able opinion of Mr. Justice Lamar in Wadley Southern Railway Co. vs. State of Georgia, 235 U. S. 651, where the authorities are reviewed and it is concluded, where penalties are so excessive as to act en terrorem, or are calculated to make a party yield obedience to the mandate of the statute or the order of the Commission before he has had an opportunity of testing the validity thereof in the courts, that a statute permitting such excessive and cumulative penalties is violative of such due process clause of the Constitution, and wherein it is also held that if the statute as construed, permits the filing of suit to contest the operation thereof and suspends such operation during the pendency of the suit, and the Railway Company fails to avail of such remedy, and in a suit by the state the validity of the statute or the action thereunder is sustained, that as applied to such a case, the statute

permitting the penalties will be regarded as constitutional.

241 In this connection, we direct attention to the fact that while the Texas statutes provide for the filing of a suit to contest the order of the Commission (Article 6657), the railway company is not excused from obedience to such order pending such suit, but to the contrary, the order is made expressly conclusive upon the railway company until finally found unreasonable in a suit so filed (Article 6656).

Under the operation of Article 6656, in any suit against a railway company for failure to stop trains 17 or 18 at Meridian, the order would be conclusive and not subject to contest, although a suit by the railway company against the Commission might be pending as provided for in Article 6657.

In addition to actual damages, if the failure to provide Meridian with sleeping car accommodations or to stop trains 17 and 18 should be deemed a discrimination under paragraph I of Article 6670, then all private claimants could recover a penalty for each offense under Article 6671 of not less than $125.00 nor more than $500.00, and this although the suit might be pending by the railway company against the Commission under Article 6657 to test the validity of the order.

Article 6672 as construed in this case, taken in connection with Article 6656 (which in effect requires obedience to the orders of the Commission pending a contest under Article 6657) would have subjected the railway company to a penalty of $10,000.00 per day, although it had immediately upon the making of the order by the Commission filed a suit under Article 6657 to contest the same.

This construction is plain, because under Article 6656 the railway company would not have been excused from obeying the order during the pendency of a suit filed under Article 6657 to contest the order, and Article 6672 prescribes the penalty for violating any provision of the chapter or refusing to perform any other duty enjoined upon it, or for failing to obey any lawful order, judgment, or decree made by the Railroad Commission of Texas.

242 It is plain that the effect of Article 6656 was to make the order of the Commission lawful until finally held otherwise under a suit brought under Article 6657, and hence if the railroad company had brought such a suit and failed to comply with the order pending the same, it would nevertheless have been liable for the penalty above mentioned of $10,000.00 per day. That under the authorities cited and the reasoning of the court in Wadley Southern Railway Company vs. State of Georgia, the statute prescribing penalties under such circumstances is unconstitutional, seems too plain to permit further discussion.

Our construction of these statutes is the same as that of the Circuit Judge of the United States in Mercantile Trust Co. vs. Texas & Pacific Railway Co., 51 Fed. Rep. 529. See particularly pages 540 to 543. This opinion of the Circuit Judge was before the Supreme Court of the United States in the Reagan cases, 154 U. S. p. 362, and so much of the decree of the Circuit Court as held the entire Commission act void because of the unconstitutionality of Section 5

(now Article 6656) and of the related sections prescribing penalties in favor of the State and individuals for failure to comply with the rates or orders of the Commission was reversed, upon the ground that although such features of the law might be deemed unconstitutional, as held by the Circuit Court, that they might be struck out of the law and *be* balance of the statute be effective. Hence, the Supreme Court did not overrule the construction placed by the Circuit Court on those features of the statute now under consideration, which in effect as construed by the Circuit Court, require the railway companies to obey the rates and orders of the Commission, pending a contest of the same, so that this case does not fall within the qualification announced by the court in Wadley Southern Railway Co. vs. State of Georgia, above cited, which holds where the statute suspends an order of the Commission, upon the filing of a suit by the railway company to contest the same, and the railway company fails to file such a suit, and in a subsequent suit by
243 the state the order is sustained, thzt the penalties may be recovered.

Here, as we have pointed out, if the Railway Company had filed the suit as permitted by Article 6657, such a suit would not have suspended the order of the Commission, but the same would have remained in effect by virtue of Article 6656.

As your Honors will recall, the decision of the Circuit Court in Mercantile Trust Co. vs. Texas & Pacific, 51 Fed. Rep. 529, became very prominent in the history of Texas for several years after it was rendered. Since then, our statutes have been revised at least twice, and those portions of the original Commission act now under discussion, have been carried into each revision of the statutes without any change in the language affecting this question. Compare Sections 5, 6 and 7 of the act of April 3rd, 1891, laws or 1891, pages 58 and 59 with Articles 6656, 6657 and 6658 of our Revised Statutes. Upon the authority of Williams vs. Pound, 48 Texas, 141, and G. C. & S. F. Ry. Co. vs. Fort Worth & New Orleans Ry. Co., 68 Texas, 106, the Legislature having twice incorporated the above sections in the Revised Statutes without change, must be presumed to have intended that the same construction should be placed thereon as had been placed thereon by the Circuit Court in Mercantile Trust Co. vs. Texas & Pacific Ry. Co., 51 Fed. Rep. 529.

We, therefore, respectfully request a reconsideration of the application for writ of error, and that same be granted as originally prayed for.

A. H. CULWELL,
TERRY, CAVIN & MILLS,
Attorneys for Plaintiff in Error.

244 Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing twelve pages contain a true and correct copy of the original motion for rehearing on refusal of

writ of error in App. No. 9055, G. C. & S. F. Ry. Co. vs. State of Texas, now on file in this office.

Witness my hand and the seal of the Supreme Court of Texas, at Austin, this the 16th day of April, A. D. 1916.

[SEAL.] F. T. CONNERLY, *Clerk.*

April 5th, 1916.

(*Certified Copy of Order Overruling Motion for Rehearing.*)

Mo. No. 3580.

G., C. & S. F. Ry. Co.
vs.
STATE OF TEXAS.

From Travis County, Third District.

For rehearing of App. No. 9055.—Overruled.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas, entered April 5th, 1916, overruling motion for rehearing in Mo. No. 3580—App. No. 9055, G. C. & S. F. Ry. Co. vs. The State of Texas.

Witness my hand and the seal of said court at the city of Austin, this the 10th day of April A. D. 1916.

[SEAL.] F. T. CONNERLY,
Clerk Supreme Court.

(Endorsed:) Mo. No. 3580. Appl. No. 9055. G. C. & S. F. Ry. Co. vs. State of Texas. Certified copy of order of Supreme Court overruling motion for Rehearing. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Tex., Apr. 11, 1916. R. H. Connerly, Clerk.

245 Clerk's Office, Supreme Court.

No. 9055.

G., C. & S. F. Ry. Co.
vs.
State of Texas.

Certified Copy Bill of Costs Supreme Court.

Filing Application	.50
Docketing Petition	.50
Entering Appearance of Counsel	.50
Filing two briefs	.60
Filing 5 papers	1.50
Entering Orders (3)	1.50
Entering Judgment on Application	1.00
Certified Copy of Judgment	1.00
Taxing Cost of Application	.50
Certified Copy of Bill of Costs	1.00
Filing and Entering Motions (2)	1.10
For Recording Opinion	.60
	$10.30

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and seal of said court, at Austin, this the 6th day of April, 1916.

[SEAL.] F. T. CONNERLY, *Clerk.*

(Endorsed:) Application. No. 9055. Certified copy Bill of Costs, in Supreme Court, Austin. G. C. & S. F. Ry. Co. vs. State of Texas $10.30. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Tex., Apr. 6, 1916. R. H. Connerly, Clerk.

246 In the Supreme Court of the United States.

Gulf, Colorado and Santa Fe Railway Company, Plaintiff in Error,
vs.
The State of Texas, Defendant in Error.

Petition for Allowance of Writ of Error.

To the Honorable W. M. Key, Chief Justice of the Court of Civil Appeals of the Third Supreme Judicial District of Texas:

Comes now Gulf, Colorado and Santa Fe Railway Company by its Attorneys, J. W. Terry, Gardiner Lathrop, Alex S. Britton,

Evans Browne and A. H. Culwell, and complains that in the record and the proceedings, as also in the rendition of judgment in a suit between Gulf, Colorado and Santa Fe Railway Company and the State of Texas in the Court of Civil Appeals of the Third Supreme Judicial District of Texas, being the highest court of law or equity in said State to which the said plaintiff in error could appeal and obtain a decision on the merits of the issues involved in said cause, and same being the court which has the final custody of the record in said cause, and that final judgment having been rendered against the said plaintiff in error by said Court of Civil Appeals of the Third Supreme Judicial District of Texas on the 3rd day of June, 1914, and in which plaintiff in error's motion for rehearing was overruled by said court on the 1st day of July, 1914, and in which the Supreme Court of Texas has refused to grant to your petitioned a writ of error, and that in said cause there is drawn in question a title, right, privilege or immunity claimed under the Constitution and authority exercised under the United States, and the decision has been against the title, right, privilege or immunity, especially set up and claimed by your petitioner under such Constitution and authority, and where is drawn in question the validity of a statute of or authority exercised under the State of Texas on the ground of their
247 being repugnant to the Constitution and Laws of the United States, and the decision has been in favor of their validity, and whereby the judgment entered in the District Court of Travis County, Texas, against your petitioner and in favor of defendant in error in the sum of Twenty-two Thousand Four Hundred Dollars ($22,400.00) besides interest and costs was affirmed and the further judgment was entered requiring your petitioner to stop certain of its trains at the station of Meridian in the State of Texas, and which said judgment is now a final judgment, and from which there is no appeal to any other court or courts within the State of Texas; that plaintiff in error denied in the said Court of Civil Appeals for the Third Supreme Judicial District of Texas, as well as the District Court of Travis County, the right of defendant in error to maintain this action or to recover herein against it, for that the said two trains which the Railroad Commission of the State of Texas had ordered your petitioner to stop at the station of Meridian to receive and discharge passengers, and for its failure to so do this suit was instituted to recover penalties and to secure the issuance of a mandatory injunction in behalf of defendant in error, were interstate trains and were being run primarily to accommodate the interstate passenger business of plaintiff in error, and that same were not subject to the order of the Railroad Commission of Texas, your said petitioner having provided full, ample and adequate passenger train facilities to accommodate the said station of Meridian, in the State of Texas, and for the proper and ample accommodation of all those desiring to take passage at said station or to alight from its trains thereat, and that by the use of other trains which do stop at Meridian it had afforded to the people of that community adequate train service, and all that was reasonably necessary to accommodate the traveling public at said place, and that the judgment of the courts rendered herein

and based upon the order of the Railroad Commission of Texas is and was violative of paragraph 3, section 8 of the Constitution of the United States, in that same is and was an attempt to
248 regulate commerce among the several states and is, therefore, void and that said judgment is erroneous and violative of the Fourteenth Amendment to the Constitution of the United States, in that same is a taking of your petitioner's property without due process of law and is a denial to it of equality before the law, and that said judgment imposed an unreasonable burden upon the defendant, and is thereby an infringement of its private rights, and in each of said courts by a proper plea and assignment of error these questions were duly presented by your petitioner and same, and each of them, were by each of said courts overruled; all of which appears in the record and proceedings of said suit; manifest error hath happened to the great damage of the Gulf, Colorado and Santa Fe Railway Company;

Wherefore, the said Gulf, Colorado and Santa Fe Railway Company by its Attorneys prays the allowance of writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. W. TERRY,
GARDINER LATHROP,
ALEX S. BRITTON,
EVANS BROWNE,
A. H. CULWELL,
Attorneys for Gulf, Colorado and Santa Fe Railway Company, Plaintiff in Error.

Allowed by
W. M. KEY,
Chief Justice Court of Civil Appeals of the Third Supreme Judicial District of Texas.

(Endorsed:) Gulf, Colorado & Santa Fe Ry. Co., Pl'ff in error vs. State of Texas, Def't in Error. Petition for allowance of writ of error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Tex., Apr. 11, 1916. R. H. Connerly, Clerk.

249 In the Supreme Court of the United States.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Assignments of Error.

Comes now Gulf, Colorado and Santa Fe Railway Company, plaintiff in error, by its Attorneys J. W. Terry, Gardiner Lathrop, Alex S. Britton, Evans Browne and A. H. Culwell, and says that in

the record and proceedings aforesaid there is manifest error in the judgment and decision of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, to-wit:

First. The evidence in this case shows conclusively that each and both of the trains which were ordered to be stopped at Meridian, Texas, by the Railroad Commission of Texas, and for the failure to do which this suit was instituted, were interstate trains running between Galveston, Texas, and points outside of and beyond the limits of said State. That they were primarily initiated and put on for the handling of interstate passenger business and the rapid transit of United States mails, and the evidence further showing as it does without conflict that the plaintiff in error had, and has by the use of other trains which do stop at Meridian, afforded to the people of that community adequate passenger train service, and all that was reasonably necessary to accommodate the traveling public at said place; wherefore, the judgment of the Court of Civil Appeals of the Third Supreme Judicial District of Texas affirming the judgment of the District Court of Travis County, Texas, rendered herein, and based upon the order of the Railroad Commission of Texas, is and was violative of paragraph 3, section 8 of the Constitution of the United States, in that same is an attempt to regulate commerce among the several states and is, therefore, void and that said Court of Civil Appeals of the Third Supreme Judicial District of Texas erred
250 in affirming the judgment of the District Court of Travis County, Texas;

Second. The judgment of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, whereby is affirmed the judgment against plaintiff in error and in favor of defendant in error herein is erroneous because the evidence affirmatively shows that the two trains in question, to-wit: numbers 17 and 18, handle United States mails under a contract with the United States Government; that they are through trains, which in connection with The Atchison, Topeka and Santa Fe Railway Company afford a through and rapid passenger service between Galveston, Texas and the cities of the North and East, and in view of these facts which appear without conflict, and of the further fact that adequate passenger train service is afforded to the people of Meridian, Texas, by other trains run by plaintiff in error and stopped at said station, the judgment of the Court of Civil Appeals of the Third Supreme District of Texas affirming the judgment entered in the lower court against plaintiff in error is erroneous and violative of the Fourteenth Amendment to the Constitution of the United States, in that same is a taking of plaintiff in error's property without due process of law and is a denial to it of the equal protection of the law.

Third. The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in affirming the judgment of the District Court of Travis County, Texas, rendered against plaintiff in error, and in holding that the order of the Railroad Commission of Texas requiring the plaintiff in error to stop its trains numbers 17 and 18 at Meridian, Texas, was valid and enforceable for the reason that under the evidence adduced neither of said trains was subject to the order

and jurisdiction of the Railroad Commission of Texas, because the evidence affirmatively shows that said trains were interstate in character and used primarily for the purpose of handling interstate commerce, and that adequate facilities to accommodate the traveling public at Meridian, Texas, had been provided by plaintiff in
251 error by the use of other trains, and the order of the Railroad Commission of Texas as herein sued upon was void and the Commission had no jurisdiction to enter the same, or any other order affecting the stoppage of said trains at any point.

Fourth. The evidence in this case shows affirmatively that the amount of passenger business originating at and destined to Meridian, Texas, does not and will not warrant the plaintiff in error in stopping any other, further or additional trains at that place, and does not warrant plaintiff in error in stopping its trains numbers 17 and 18 thereat; that any destination to be reached by either of said trains can be reached by other trains which are scheduled to stop thereat, and that as said trains are interstate trains handling interstate commerce in sharp competition with other lines of railroad engaged in similar business, the statute of the State of Texas, under which the order of the Railroad Commission of Texas was issued, and the order of the Railroad Commission itself and the judgment of the District Court of Travis County, Texas, rendered herein are unconstitutional and void and violative of paragraph 3, Section 8 of the Constitution of the United States, and the Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in not so holding.

Fifth. The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding that the adequacy of train service at any given station may be determined by the character and extent of the Pullman or sleeping car service provided on trains which are scheduled to stop thereat, and in holding that the train service provided by the plaintiff in error at the station of Meridian was inadequate because of the fact that none of the trains which were scheduled to stop thereat provided Pullman car accommodations, and in requiring plaintiff in error to stop its said trains at Meridian because Pullman car accommodations were provided thereon, for this, that it is no part of the duty of a railway company to provide Pullman or sleeping car accommodations at any given station, and the adequacy of its train service can not be judged by the
252 Pullman or sleeping car accommodations provided. Pullman or sleeping car service is a facility which has been regulated by the Act of Congress familiarly known as the Hepburn Act and being 34th Statute, 584 United States Compiled Statutes, Supplement 1911, page 1284, and same having been so regulated is not subject to regulation or control by the Railroad Commission of Texas, and no order of the Railroad Commission of Texas relating to train service, and based upon Pullman or sleeping car accommodations is enforcible, and the Honorable Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in not so holding.

Sixth. Pullman or sleeping car accommodations on interstate trains having been regulated and the right to regulate the same

having been assumed by Act of Congress is not subject to regulation by any state, and any effort of the Railroad Commission of Texas, to regulate the same either directly or indirectly is void, and the judgment affirmed herein by the Court of Civil Appeals of the Third Supreme Judicial District of Texas is a regulation of the Pullman or sleeping car service provided upon interstate trains of plaintiff in error, in that a judgment has been affirmed against plaintiff in error, wherein it is decreed that its train service at Meridian, Texas is inadequate because none of the trains scheduled to stop thereat provided Pullman or sleeping car accommodations, and this service is not within the power of the State of Texas or any of its administrative bodies to regulate and adequacy of train service may not be determined thereunder, and the Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding otherwise.

Seventh. As construed by the Court of Civil Appeals of the Third Supreme Judicial District of Texas, the statute of the State of Texas, under which the fine herein complained of was assessed, to-wit, Article 6672, is unconstitutional and void and the fine herein
253 assessed is excessive and out of proportion to the offence committed, if any. Such fine is, therefore, violative of the Fourteenth Amendment to the Constitution of the United States as thereby the plaintiff in error is denied the equal protection of the laws and is deprived of its property without due process of law.

Eighth. The fine herein imposed and the judgment for which has been affirmed by the Court of Civil Appeals for the Third Supreme Judicial District of Texas is unusual, cruel and excessive, and, therefore, violative of the Constitution of the United States and the said Court of Civil Appeals erred in holding that plaintiff in error could be made liable for the amount of the fines imposed by the judgment rendered herein.

J. W. TERRY,
GARDINER LATHROP,
ALEX S. BRITTON,
EVANS BROWNE,
A. H. CULWELL,
Attorneys for Gulf, Colorado and Santa Fe Railway Company.

(Endorsed:) Gulf, Colorado & Santa Fe Ry. Co., Pl'ff in Error, vs. State of Texas, Def't in Error. Assignments of Error. Filed in Court of Civil Appeals, 3rd Supreme Judicial District Austin Tex. Apr. 11, 1916. R. H. Connerly, Clerk.

254 In the Supreme Court of the United States.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

STATE OF TEXAS, Defendant in Error.

Know all men by there presents; That we, Gulf, Colorado and Santa Fe Railway Company, as principal, and Jno. Sealy and Geo. Sealy, as sureties, are held and firmly bound unto the State of Texas in the full and just sum of Sixty Thousand Dollars ($60,000.00), to be paid to the said the State of Texas, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents:

Whereas, lately in the Court of Civil Appeals of the Third Supreme Judicial District of Texas in a suit pending in said court, wherein Gulf, Colorado and Santa Fe Railway Company was appellant and the State of Texas was appellee a judgment was rendered against the said appellant, Gulf, Colorado and Santa Fe Railway Company in the sum of Twenty-two Thousand Four Hundred Dollars ($22,400.00), besides interest and costs of suit, and appellant was further required under the judgment entered to stop certain of its trains at the station of Meridian, in the State of Texas, and the said Gulf, Colorado and Santa Fe Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and the citation directed to the said the State of Texas citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington Thirty (30) days from the date hereof; now the condition of the above obligation is such that if the said Gulf, Colorado and Santa Fe Railway Company shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to

255 be void, else to remain in full force and virtue.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
By TERRY, CAVIN & MILLS,
Its Solicitors.

JNO. SEALY.
GEO. SEALY.

Writ to operate as a supersedeas.

Allowed By:
W. M. KEY,
Chief Justice Court of Civil Appeals of the Third Supreme Judicial District of Texas.

THE STATE OF TEXAS,
County of Galveston:

I, Jno. Sealy, do solemnly swear that I am worth in my own right at least the sum of Sixty Thousand Dollars ($60,000.00), after deducting from my property that which is exempt by the Constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Galveston county, state of Texas, and have property in said state liable to execution worth more than Sixty Thousand Dollars ($60,000.00).

JNO. SEALY.

Subscribed and sworn to before me this 10th day of April, 1915.

[SEAL.] CHAS. ZAPPOLD,
Notary Public in and for Galveston County, Texas.

THE STATE OF TEXAS,
County of Galveston:

I, Geo. Sealy, do solemnly swear that I am worth in my own right at least the sum of Sixty Thousand Dollars ($60,000.00) after deducting from my property that which is exempt by the Constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Galveston County, state of Texas
and have property in said state liable to execution worth
256 more than Sixty Thousand Dollars ($60,000.00).

GEO. SEALY.

Subscribed and sworn to before me this 10th day of April, 1916.

[SEAL.] CHAS. ZAPPOLD,
Notary Public in and for the County of Galveston, Texas.

(Endorsed:) Gulf, Colorado & Santa Fe Ry. Co. Pl'ff in Error vs. The State of Texas, Def't in Error. Bond. Filed in Court of Civil Appeals 3rd Supreme Judicial District Austin, Tex., Apr. 11, 1916. R. H. Connerly, Clerk.

257 In the Supreme Court of the United States.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

President of the United States to the Honorable the Court of Civil Appeals of the Third Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals of the Third Supreme Judicial District of Texas before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Gulf, Colorado and Santa Fe Railway Company, plaintiff in error, and the State of Texas, defendant in error, wherein there is drawn in question a title, right, privilege or immunity claimed under the Constitution and authority exercised under the United States, and the decision is and has been against the title, right, privilege or immunity so especially set up and claimed by said plaintiff in error, and where is drawn in question the validity of a statute of or authority exercised under the State of Texas on the ground of their being repugnant to the Constitution and laws of the United States and the decision has been in favor of their validity, and manifest error hath happened to the great damage of the said Gulf, Colorado and Santa Fe Railway Company as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under

258 your seal distinctly and openly you send the record and proceedings with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within Thirty (30) days from the date hereof in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States on the 11th day of April, in the Year of Our Lord, One Thousand Nine Hundred and Sixteen.

D. H. HART,
Clerk of the District Court of the United States in and for the Western District of Texas for the Fifth Circuit,
By A. B. COFFEE, *Deputy.*

Writ to operate as supersedeas.

Allowed by.
W. M. KEY,
Chief Justice Court of Civil Appeals of the Third Supreme Judicial District of Texas.

It is hereby certified that a copy of this writ is this day lodged in the Clerk's office for the use of the defendant in error this the 11th day of April A. D. 1916.
[SEAL.] R. H. CONNERLY,
Clerk of the Court of Civil Appeals, Third Supreme Judicial District of Texas.

(Endorsed:) Copy. Gulf, Colorado & Santa Fe Ry. Co., Pl'ff in Error, vs. State of Texas, Def't in Error. Writ of Error. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Tex., Apr. 11, 1916. R. H. Connerly, Clerk.

259 In the Supreme Court of the United States.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
STATE OF TEXAS, Defendant in Error.

Citation.

UNITED STATES OF AMERICA:

To the State of Texas, Greeting:

You are hereby cited and admonished to be and appear in a Supreme Court of the United States to be holden at Washington within Thirty (30) days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals of the Third Supreme Judicial District of Texas at Austin, Texas, wherein Gulf, Colorado and Santa Fe Railway Company is plaintiff in error and you are defendant in error, said cause being numbered 5300 on the docket of the said Court of Civil Appeals of the Third Supreme Judicial District of Texas, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. M. Key, Chief Justice of the Court of Civil Appeals of the Third Supreme Judicial District of Texas at Austin, Texas this 11th day of April 1916.

W. M. KEY,
Chief Justice Court of Civil Appeals of the Third Supreme Judicial District of Texas.

Attest:
[SEAL.] R. H. CONNERLY,
Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of Texas.

Service of this citation is hereby accepted.
April 11th, 1916.

THE STATE OF TEXAS,
By B. F. LOONEY,
Attorney General.

(Endorsed:) Copy. Gulf, Colorado & Santa Fe Ry. Co., Pl'ff in Error, vs. State of Texas, Def't in Error. Citation. Filed in
260 Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Tex., Apr. 11, 1916. R. H. Connerly, Clerk.

261 *Bill of Costs in Court of Civil Appeals.*

No. 5300.

GULF, COLORADO & SANTA FE RAILWAY CO., Appellant,
vs.
THE STATE OF TEXAS, Appellee.

From Travis Co.

Filing record, 50¢, Docketing cause, 50¢, Appearances, $1.00.	$2.00
Filing Briefs, $1.30, Filing and entering motions (3) $1.05.	2.40
Orders, $4.00, Filing 33 extra papers, $3.30	7.30
Continuances, (2) 40¢; Judgment, $1.00; Taxing costs 50¢.	1.90
Mandate, $1.50, Recording opinion $5.00	6.50
Certified copy bill costs	.75
Certified copy orders to Supreme Court	2.00
Notices, (18) $9.00; Copy motion $7.30	16.30
Precept, $1.00; Sheriff's fees, $1.00	2.00
Supreme Court costs	10.30
Paying Federal Clerk attesting writ	1.00
Certificate	.50
Transcript to U. S. Supreme Court	145.75
Total	199.65

262 Clerk's Office, Court of Civil Appeals, Austin, Texas.

I, R. H. Connerly, Clerk of the Court of Civil Appeals, 3rd Supreme Judicial District of Texas, hereby certify that the foregoing 261 pages contain true and correct copies of all proceedings had in the District Court of Travis County, in the Court of Civil Appeals of the Third Supreme Judicial District of Texas and in the Supreme Court of Texas, in the case in said Court of Civil Appeals numbered 5300, entitled—Gulf, Colorado & Santa Fe Railway Company, Appellant, vs. The State of Texas, Appellee, from District Court of Travis County, Texas, as shown by the records in said case now on file in my office.

And I further certify that the original writ of error and original Citation in error in said case to the Supreme Court of the United States of America are hereinafter attached to this record. Witness my hand and the seal of said Court of Civil Appeals of the Third Supreme Judicial District of Texas, this the 15th day of April, A. D. 1916.

[Seal Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY,
Clerk Court of Civil Appeals, 3rd Supreme Judicial District of Texas.

263 In the Supeme Court of the United States.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

President of the United States to the Honorable the Court of Civil Appeals of the Third Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals of the Third Supreme Judicial District of Texas before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Gulf, Colorado and Santa Fe Railway Company, plaintiff in error, and the State of Texas, defendant in error, wherein there is drawn in question a title, right, privilege or immunity claimed under the Constitution and authority exercised under the United States, and the decision is and has been against the title, right, privilege or immunity so especially set up and claimed by said plaintiff in error, and where is drawn in question the validity of a statute of or authority exercised under the State of Texas on the ground of their being repugnant to the Constitution and laws of the United States and the decision has been in favor of their validity, and manifest error hath happened to the great damage of the said Gulf, Colorado and Santa Fe Railway Company as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command
264 you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within Thirty (30) days from the date hereof in the said

Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States on the 11th day of April, in the Year of Our Lord, One Thousand Nine Hundred and Sixteen.

[The Seal of the U. S. District Court.]

D. H. HART,
Cerk of the District Court of the United States in and for the Western District of Texas for the Fifth Circuit.
By A. B. COFFEE, *Deputy.*

Writ to operate as supersedeas.

Allowed by:
W. M. KEY,
Chief Justice Court of Civil Appeals of the Third Supreme Judicial District of Texas.

It is hereby certified that a copy of this writ is this day lodged in the Clerk's office for the use of the defendant in error this the 11th day of April, A. D. 1916.

[Seal Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY,
Cerk of the Court of Civil Appeals, Third Supreme Judicial District of Texas.

265 [Endorsed:] Gulf Colorado & Santa Fe Ry. Co., Pl'ff in Error vs. State of Texas. Def't in Error. Writ of Error. Filed in Court of Civil Appeals 3d Supreme Judicial District, Austin, Tex., Apr. 11, 1916. R. H. Connerly, Clerk.

266 In the Supreme Court of the United States.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
STATE OF TEXAS, Defendant in Error.

Citation.

United States of America to the State of Texas, Greeting:

You are hereby cited and admonished to be and appear in a Supreme Court of the United States to be holden at Washington within Thirty (30) days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals of the Third Supreme Judicial District of Texas at Austin, Texas, wherein Gulf,

Colorado and Santa Fe Railway Company is plaintiff in error and you are defendant in error, said cause being numbered 5300 on the docket of the said Court of Civil Appeals of the Third Supreme Judicial District of Texas, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. M. Key, Chief Justice of the Court of Civil Appeals of the Third Supreme Judicial District of Texas at Austin, Texas this 11th day of April, 1916.

W. M. KEY,
Chief Justice Court of Civil Appeals of the Third Supreme Judicial District of Texas.

[Seal Court of Civil Appeals of the State of Texas.]

Attest:

R. H. CONNERLY,
Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of Texas.

267 Service of this citation is hereby accepted.

April 11th, 1916.

THE STATE OF TEXAS,
By B. F. LOONEY,
Attorney General.

268 [Endorsed:] Gulf Colorado & Santa Fe Ry. Co., Pl'ff in Error vs. State of Texas, Def't in Error. Citation. Filed in Court of Civil Appeals 3d Supreme Judicial District, Austin, Tex., Apr. 11, 1916. R. H. Connerly, Clerk.

Endorsed on cover: File No. 25,262. Texas Court of Civil Appeals, 3d Supreme Judicial District. Term No. 465. Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, vs. The State of Texas. Filed April 26th, 1916. File No. 25,262.

FILED
OCT 9 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 158

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF TEXAS,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

J. W. TERRY,
A. H. CULWELL,
ROBERT DUNLAP,
Attorneys for Plaintiff in Error.

GARDINER LATHROP,
Of Counsel.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 158

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE STATE OF TEXAS,

Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This suit was instituted in the District Court of Travis County, Texas, by the State of Texas, on May 1, 1912, to enjoin obedience by the Railway Company to an order of the Texas Railroad Commission, effective April 2, 1912, requiring the stoppage of its two interstate trains, Nos. 17 and 18, at Meridian, the county seat of Bosque County, Texas, in addition to four other local trains then

stopping at said place, and to recover penalties at the rate of $5,000 for each failure so to comply from said April 2, 1912, until the date of final trial of the case. (Pr. Tr., 2-6.)

The Commission's order was ostensibly made under the second paragraph of Article 6676 (see Vernon's Sayles' Texas Civil Statutes, 1914, Vol. 4, p. 4361) reading as follows:

> "6676. 'Road,' 'railroad,' 'railroad companies,' etc., defined. Law applies only to railroads in this state. One train a day to be run.—The terms, 'road,' 'railroad,' 'railroad companies,' and 'railroad corporations,' as used herein, shall be taken to mean and embrace all corporations, companies, individuals and associations of individuals, their lessees or receivers, appointed by any court whatsoever, that may now or hereafter own, operate, manage or control any railroad, or part of a railroad, in this state, and all such corporations, companies and associations of individuals, their lessees or receivers, as shall do the business of common carriers on any railroad in this state.
>
> 1. The provisions of this chapter shall be construed to apply to and affect only the transportation of passengers, freight and cars between points within this state; and this chapter shall not apply to street railways nor suburban or belt lines of railways in or near cities and towns.
>
> 2. It shall be the duty of the commissioners to see that, upon every railroad and branch of same carrying passengers for hire in this state, shall be run at least one train a day, Sundays excepted, upon which passengers shall be hauled, and the commission shall have no power to relax this provision, and shall further regulate passenger train service by requiring all passenger trains carrying passengers for hire to stop for a time sufficient to receive and let off passengers at such stations as may be designated by the commissioners; *provided, that four trains each way, carrying passengers for hire, if so many are run daily, Sundays excepted, be required to stop as aforesaid at all county seat stations.* (Id. sec. 22. Amended Acts 1903, p. 183.)" (Italics ours.)

The penalties were sought to be imposed in addition to the mandatory relief prayed for under Article 6672, reading as follows:

> "Penalty not otherwise provided.—If any railway company doing business in this state shall hereafter violate any other provision of this chapter, or shall do any other act herein prohibited, or shall fail or refuse to perform any other duty enjoined upon it for which a penalty has not been provided by law, or shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the railroad commission of Texas, for every such act of violation it shall pay to the state of Texas a penalty of not more than five thousand dollars. (Id. sec. 18. Amended Acts 1901, p. 265.)"

Defendant's amended answer set up, among other things, that trains Nos. 17 and 18 were intended primarily to accommodate interstate business, affording through passenger train service between Galveston and Kansas City, Chicago, Denver and many other places, and were and are interstate trains put on principally for the purpose of handling through traffic and giving quick through passenger service; that defendant's railway connected at Purcell, Oklahoma, with The Atchison, Topeka & Santa Fe Railway and said trains were run through over said lines; said trains were designed for the rapid transportation of United States mails under contract with the federal government and required fast schedule through service to compete with other lines of railroad in the despatch of United States mails, as well as for the interstate transportation of passengers and the express business; that Meridian is a small town of but little commercial importance and business originating thereat or destined thereto did not warrant and would not warrant or justify the stopping of said trains; that six other local trains, three each way, stopped at said Meridian and provided sufficient transportation or train service for that locality, two of said local trains, one each way, being put on after

the making of the order of the Commission; that the order in question was unreasonable and arbitrary and was an undue, unwarranted and unnecessary interference with and control of the interstate commerce carried on by defendant on its said two through trains and violative of paragraph 3, section 8, Article I, the Commerce Clause, of the Federal Constitution; that the statute under which penalties were sought to be imposed was violative of the Fourteenth Amendment to the Federal Constitution, depriving defendant of its property without due process of law and denying to it the equal protection of the law, (Pr. Tr., 6-10.)

The Gulf, Colorado & Santa Fe Railway Company, a Texas corporation, was empowered to and did construct and operate an extension to its railroad from Texas into the Indian Territory, now Oklahoma, under an Act of Congress approved July 4, 1884 (23 U. S. Stats. at Large, p. 69 *et seq.*), such line being constructed to Purcell, Oklahoma, where it connected with the Southern Kansas Railway, now owned and operated by The Atchison, Topeka & Santa Fe Railway Company and which latter railway was constructed in the Indian Territory, now Oklahoma, under a similar Act of Congress approved the same date as above. (23 U. S. Stats. at Large, p. 73 *et seq.*) Passage of the above Act of Congress granting such rights to the G. C. & S. F. Rly. Co. was requested by the Texas legislature as appears from copy of its "Joint Resolution" set forth in the Appendix to this brief.

The purpose of these Acts was to create interstate highways for the carrying on of interstate commerce and governmental agencies or instrumentalities, as postal and military routes. See:

Cherokee Nation v. *Southern Kansas Railway Co.*, 135 U. S., 641.

California v. *Pacific Rld. Co.*, 127 U. S., 2, 38, 39, 44, 45.

In June, 1913, the case was tried before the court, a jury being waived.

It was admitted as true (Tr. Pr., 48 and 49) that Meridian was the county seat of Bosque County, having one thousand inhabitants and over. Southbound train No. 5 was scheduled to arrive and stop at Meridian at 10:38 A. M., southbound train No. 11 at 7:56 P. M. and southbound train No. 15 at 11:48 P. M. Northbound train No. 6 was scheduled to arrive and stop at 5:25 P. M., northbound train No. 12 at 9:03 A. M. and northbound train No. 16 at 4:52 A. M. Southbound train No. 17 goes through Meridian at 11:20 P. M. and northbound train No. 18 at 5:25 A. M. *Any destination that can be reached by Nos.* 17 *and* 18 *can likewise be reached by the use of trains Nos.* 5, 6, 11 *and* 12, *as well as by Nos.* 15 *and* 16, *and Meridian can likewise be so reached from any point.*

Other railway lines operating between Galveston and competitive points on the Gulf, Colorado and Santa Fe Railway are shorter than the defendant's railway between such points. The respective distances, for instance, between Houston and Kansas City are as follows: Via Trinity & Brazos Valley Railway and the M., K. & T. Railway, 766 miles. Via Trinity & Brazos Valley Railway and the C., R. I. & P. Railway, 875 miles. Via Houston & Texas Central Railway and the Frisco, 816 miles. Via the Missouri, Kansas & Texas Railway, 814 miles. Via the Santa Fe, 920 miles. Between Galveston and Denver the distance via the Santa Fe Lines is greater than that via other combined lines. (Pr. Tr., 48, 49, 53.)

From the table on page 49 of the record, showing the number of one-way and round-trip tickets sold each month for one year from May, 1911, it may be readily calculated that the average number of daily passengers taking the train at Meridian was about 21, while the average daily receipts of tickets sold at this station was about $25.00.

Mr. Hull, Division Superintendent of the railway located at Temple, several stations south of Meridian, testified that train No. 18 is run from Galveston over defendant's railway to Purcell, and then over the A. T. & S. F. Ry. north, carrying through equipment to Kansas City and during the summer months carrying a Pullman sleeper for Denver over the Ft. Worth & Denver Railroad from Ft. Worth. (Pr. Tr., 51.)

Train No. 17 originates at Chicago and is destined to Galveston. *These two trains are intended primarily to handle through interstate traffic.* There is strong competition for that business with other lines of railroad from Galveston, Houston and San Antonio. This interstate business is generally destined to Denver, Los Angeles and all California points reached by the A. T. & S. F. Ry., also New Mexico and Colorado points. There is also competition for business to Kansas City, Chicago and St. Louis. United States mail is handled on these two trains under contract and regulations of the Postal Department. This is also competitive business. Eight trains are operated through Meridian daily, four each way. Six of these trains, or three each way, stop at Meridian. Nos. 15 and 16 were put on after the order. No. 16 precedes No. 18 to Meridian about 33 minutes. (Pr. Tr., 52, 53.)

Anybody going north could take No. 16 out of Meridian. Going south No. 17 precedes No. 15 about 28 minutes. For a period of 30 days in October and November, 1912, trains Nos. 17 and 18 stopped at Meridian for experimental purposes and an account taken and kept of passengers patronizing same. (Pr. Tr., 53.)

From this account (Pr. Tr., 60) it appeared that the number of passengers on these two trains respectively for Meridian varied from none to as high as five in any one day, while the number of passengers from Meridian varied from none to as high as four, and during that time there were but two sleeping car passengers for Meridian.

He then showed why Nos. 17 and 18 stopped at some other stations either for operating reasons, such as taking water or on account of connections

with other lines, or because there was more business at such places. (Pr. Tr., 53, 54.)

Only trains Nos. 17 and 18 carry Pullman sleepers south of Cleburne to Houston and Galveston, except now Nos. 5 and 6 carry such sleepers to and from Waco, several stations south of Meridian. (Pr. Tr., 55.)

One wishing to go from Cleburne or Meridian to Galveston in a sleeping car on the Santa Fe would have to go to Temple, several stations south, on No. 11 and there take the sleeper on No. 17. One wishing to go from Galveston to Meridian could take a sleeper only as far as Temple on No. 18 and then take another train for Meridian. (Pr. Tr., 57.)

Intrastate passengers are also carried on these trains between points where same stopped in Texas. If anyone living in Meridian wanted to go as far away from home as Galveston, they would go down in the daytime and not at 11:00 or 12:00 o'clock at night. Could not stop No. 18 at Meridian without ten minutes delay and No. 17 probably four or five minutes. There would also be incidental additional delay in slowing down to stop and in speeding up after starting. (Pr. Tr., 59.)

Passenger receipts for 12 months ending May, 1913, were much less for Meridian than other stations in the vicinity, one of which (Valley Mills) contained less population and at which stations with one exception (Clifton) these two trains did not stop. (Pr. Tr., 61.)

The Official Railway and Hotel Guide, put in evidence by plaintiff, showed that in 1910 the population of Meridian was 1,000 (Pr. Tr., 62), while in 1912 it was but 718. (Pr. Tr., 64.)

On behalf of plaintiff, Mr. Robertson, a lawyer of Meridian, testified among other things that the population was about 1500. He had occasion to make trips to Galveston. He usually went south to Waco, several stations beyond, and there took a Houston & Texas Central sleeper which made close connections there. To go by way of the Santa Fe he would have to go toTemple and there await No. 17 for a sleeper. A good many people make trips to Austin from Me-

ridian, Austin, however, being on another line of railroad. (Pr. Tr., 67.) One can catch these fast trains at Clifton, the next station south, about 10 miles distant on the railway. (Pr. Tr., 68, 64.)

He traveled more than anybody else in Meridian. Went to Galveston more than anywhere else. If No. 17 stopped at Meridian he could not get to bed until its arrival about 12:30 A. M. He could, however, go to Waco and take the Katy, or H. & T. C., or I. & G. N., and take a sleeper about 10:00 or 11:00 P. M. The Santa Fe has the best equipment in the state. (Pr. Tr., 69.)

Miss Odle, living in Austin, had occasion once to travel to Meridian and experienced some inconvenience through taking the fast train which did not stop at Meridian. (Pr. Tr., 71, 72.)

Mr. Cuthberth, living at Meridian, testified he was county clerk. In order to get the benefit of a sleeper "you must take another train and run up or down the road and wait for the fast trains carrying sleeping cars." He owned an automobile and being a public man took friends to Morgan or Clifton, the next stations from Meridian, to catch these fast trains. He testified to some inconvenience in going to Dallas, transacting business there and returning on the same day. (Pr. Tr., 72.) Addition of trains Nos. 15 and 16 has altered conditions so far as local travel is concerned, but they do not carry sleeping cars. (Pr. Tr., 73.) In order to maintain a fast train schedule and through service presume it is necessary somebody somewhere must be discommoded to some extent. You could not have a fast train and make every local stop. Probably true that Meridian is the smallest town for a county seat of any town located on the Santa Fe railroad. Meridian has had its drawbacks. (Pr. Tr., 74.)

Mr. Watson, living in Austin, gave his experience as to some inconvenience in going from there to Meridian. He deliberately took the fast train which he knew would not stop at Meridian and was, therefore, obliged to change at Cleburne. (Pr. Tr., 74, 75.)

There was virtually no dispute as to the salient facts. The other trains afforded sufficient transportation facilities. The sum and substance of the complaint was

simply that people living in Meridian, when they desired to use a Pullman sleeper or travel at night, were inconvenienced in being required to go to the station above or below Meridian and there await the fast train. The extent of this demand did not appear. If we judged from the number of tickets sold in any month during the year beginning with May, 1911, as appears on the record, page 49, it would be easy to calculate from the revenue received that the distances traveled must have been generally short. As a rule it may be said that the travel to and from that place was local, such as would be incident to a county seat of that size, where the occasion to go to and from there would not extend, as a rule, very much beyond the county. For such travel the local trains would be ample.

From the "comparative statement" filed by plaintiff (Pr. Tr., 77) if we take the most favorable month, that of August, 1911, in which the tickets and receipts greatly exceeded those of other months, we may readily calculate that at 3 cents a mile the average mileage of single-trip passengers was about 32 miles. The average mileage of round-trip passengers, say at the rate of 2½ cents a mile, would be about 98 miles, while the average mileage of those using coupons from mileage books, say at the rate of 2½ cents a mile, would be about 300 miles.

The trial court found, among other things, that between April 2, 1912, and June 27, 1913, the date of trial, there were 224 failures to stop these trains as required by the order and that $100 per day for each failure to so stop was a reasonable penalty to be imposed. (Pr. Tr., 29, 30.)

It held, as a matter of law, that the order of the Railroad Commission was valid and in compliance with Section 2 of Article 6676, Revised Statutes of Texas; that

it was not a regulation of interstate commerce, nor an interference with or burden upon the same; that its effect upon interstate commerce was only incidental and not an unreasonable restraint or interference with the same; that "the other passenger trains provided by defendant outside of trains Nos. 17 and 18 were not and are not adequate and sufficient to accommodate the local *and interstate passenger traffic* on defendant's line of railway so far as the town of Meridian is concerned inasmuch as no trains other than Nos. 17 and 18 have any sleeping car accommodations or facilities."

For the 224 violations of the order a penalty of $22,400.00, most of which accrued while the validity of the order was being judicially contested and investigated, was assessed and judgment entered. (Pr. Tr., 31, 32.) A mandatory injunction was also decreed compelling compliance with the order. (Pr. Tr., 13.)

This judgment and decree was affirmed by the Court of Civil Appeals for the Third District of Texas. (Pr. Tr., 85.) In its opinion it admitted there was no legal obligation upon railway companies to furnish sleeping car accommodations. The laws of Texas conferred no power in that respect upon the Railroad Commission.

It is said in the opinion, after stating that the traveling public were entitled to accommodations furnished by common carriers (Pr. Tr., 81):

> "It is no answer to this to say that the companies are not required to furnish sleeping car accommodations. This may be conceded, yet when they do furnish such accommodations to a part of the public, then we think they are required to furnish the same to all others, otherwise the facilities at such point could not be regarded as adequate. In passing on the adequacy of such facilities, we must look to the convenience and comfort of the passengers, as well as other features of such service. We think the court was justified in finding that adequate facilities

were not afforded by appellant to the citizens of Meridian, when it failed to stop the only two trains furnished sleeping car accommodations in and out of said town. It is futile to argue that if it be required to stop at Meridian it may also be required to stop at all other intermediate stations. The law only requires such trains to be stopped at county seats for such purpose; and unless it was shown that the failure to stop at other points along its line would be a clear abuse of its duties to the public, there would possibly be no authority on the part of the Commission to interfere with its failure to do so."

Application for a writ of error was denied by the Supreme Court of the State upon the ground that it was unable to say, *as a matter of law,* that the conclusion of the lower courts that independent of these two trains the railway facilities provided for service of citizens of Meridian were not adequate, was unwarranted. (Pr. Tr., 154, 155.)

Thus the Railroad Commission was permitted to accomplish in an indirect manner what it was not empowered by the State to do directly, and thus it was permitted to interfere with the operations of two interstate trains in order to afford localities facilities which the State law did not require. It was well known that the sleeping cars belonged to and were furnished by the Pullman Company, it making its own charge for special use of the same, and that its service was not "transportation" within the meaning of the Texas statute. (*Ft. Worth & D. C. Ry. Co. et al.* v. *State,* 99 Texas, 34; 87 S. W., 336.)

It had also been settled in the suit of the *Pullman Company* v. *Railroad Commission of Texas* and the various railroad companies operating therein, in the District Court of the United States, Northern District of Texas, which sought to enjoin an order of the Railroad Commis-

sion regarding the operation of and schedule of charges of sleeping cars made in 1907, that the Railroad Commission had no jurisdiction or power in the premises.

Judge Meek of the Federal Court entered a final decree in that case on January 13, 1908, permanently enjoining the order of the Railroad Commision, which decree was affirmed by the United States Circuit Court of Appeals at New Orleans on November 13, 1908. No written opinion, however, was filed in either court. The reasons for such holding, however, were no doubt fully stated in the dissenting opinion of Railroad Commissioner L. J. Storey, who refused to concur in the order involved in that case made by his associates. This opinion, which contains the ruling and order of the Texas Commission involved in the above case, is for convenience set forth in the Appendix to this brief.

Specification of Errors Relied Upon.

While there are seven assignments of error stating elaborately the grounds therefor (Pr. Tr., 168 to 171) yet they may be very briefly condensed as follows:

1. Error in holding that the Texas statute and order of the Railroad Commission made thereunder were not, under the evidence and facts, an unreasonable and unnecessary interference with or burden upon interstate commerce and were not violative of the commerce clause of the federal constitution or the Interstate Commerce Law; and in enjoining compliance by decree with such order.

2. Error in imposing, if the order be finally adjudged valid, any penalties under or by virtue of Article 6672, Texas Civil Statutes, or at least beyond a single penalty, especially in view of the fact that in this proceeding the question of the validity and reasonableness of the order

of the Railroad Commission was being judicially contested and investigated, and in view of the fact that the greater part of the penalties imposed accrued pending such investigation and prior to the judicial ascertainment and determination of the validity and reasonableness of the order; such imposition of penalties being violative of the Fourteenth Amendment.

ARGUMENT.

I.

THE TEXAS STATUTE AND ORDER OF THE RAILROAD COMMISSION MADE THEREUNDER REQUIRING THE STOPPAGE OF THE TWO INTERSTATE TRAINS, NOS. 17 AND 18, WERE AND ARE UNCONSTITUTIONAL AND INVALID, BEING CONTRARY TO THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION AS WELL AS CERTAIN PROVISIONS OF THE INTERSTATE COMMERCE ACT.

It is but natural to expect the people of Meridian to take a restricted view of the situation. Their horizon has that locality as its center and is limited thereby. They could not be expected to see much beyond the conveniences of their own town nor to realize how catering to the same might affect and inconvenience the traveling public in general. The state courts also unconsciously took too narrow and restricted a view of the question. Their horizon did not seem to extend beyond the state line. In respect to questions affecting the people of more than one state and their intercourse, and in respect to national questions, federal courts have been created and given jurisdiction by review or otherwise in order that a broad and not a localized view should be taken in the determination of such questions.

1. *The statute as enforced in the order of the Railroad Commission is a direct burden upon and interference with interstate commerce and therefore invalid.*

The trial court held, as a matter of law, that the other passenger trains outside of Nos. 17 and 18 because of lack of sleeping car accommodations or facilities, were not adequate and sufficient to "accommodate the local

and *interstate passenger traffic''* so far as Meridian was concerned; thus holding in effect that the state commission under the state statute had the power to regulate the interstate traffic as well as local upon these two trains in respect to that particular locality.

It will thus be seen that the order of the Railroad Commission, as construed and enforced by the Texas courts, in effect attempted to regulate interstate traffic as well as the local and the regulation is single, indivisible and not capable of separation in its application as to state and interstate traffic, so that it must fall in any event in its entirety.

Illinois Central R. Co. v. *McKendree,* 203 U. S., 514, 529, 530.

It is not probable that the Legislature would require sleeping car facilities or accommodations on all trains or on purely local trains, especially for small localities having but little travel. Nor is it likely that the Railroad Commission would make such a regulation if confined to local travel, or that such a regulation would be held reasonable in respect to such localities. However that may be, the regulation in question as applied to the two interstate trains does directly affect the carrying of interstate commerce thereon, and as applied to those trains, and the business thereon, the order or regulation is unreasonable, unnecessarily burdensome and invalid under the federal constitution.

The state commission did not undertake to require the furnishing of sleeping car facilities upon the local trains evidently because it was not empowered under the laws of the state to do so. That would, however, afford no excuse for such commission to undertake the regulation of the interstate traffic upon these two trains.

At this day it could hardly be seriously denied that a

statute, or order made thereunder, requiring the stoppage of these two trains which were primarily intended for use and used in interstate traffic, in fact would and did seriously hamper and burden the carrying on of such traffic. It would be practically impossible to determine with accuracy the additional expense imposed if the order were complied with. The necessity for rapid transportation, especially where long distances are involved, as is generally the case in interstate travel, has become acute and is felt to a much greater extent now than it was thirty or fifty years ago. In its practical operation and effect the order, as applied to these two trains, is a direct burden upon the interstate passenger travel or commerce carried thereon and would, therefore, be held, under the facts, to be invalid.

South Covington Ry. v. *Covington,* 235 U. S., 538, 547, 548.
Hall v. *DeCuir,* 95 U. S., 485.
Minnesota Rate Case, 230 U. S., 400, 416.
Seaboard Air Line v. *Blackwell,* 244 U. S., 310.

The great amount of congressional legislation passed within recent years regulating interstate transportation and the facilities therefor demonstrates as a fact that such matters have become of national rather than of local concern and importance. The regulation of matters affecting such transportation is now rather for the national than the local government in order to secure uniformity and avoid unnecessary confusion and unreasonable interference with the carrying on of such transportation.

It clearly appears as an indisputable fact of present day conditions that obstructions and delays to rapid interstate transportation are a direct interference.

Thus, in *Seaboard Air Line Ry.* v. *Blackwell,* 244 U. S.,

310, this court recently held invalid a state statute requiring the checking of the speed of trains when approaching road crossings.

> "Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines." (*Galveston, Harrisburg, etc., Ry. Co.* v. *Texas,* 210 U. S., 225.)

Such order not only hampered the defendant Railway Company in its competition for interstate traffic with shorter lines of railroad, but also would seriously interfere with the prompt and efficient carrying of the mails.

2. *Even though the order should be held to only indirectly interfere with interstate commerce, yet it would be invalid, because Congress has apparently shown its intent to cover the field by its own legislation.*

But if it should be concluded that the order in question did not impose a direct burden upon the carrying on of interstate commerce, and only incidentally and indirectly affected the same, yet if it appears that Congress has manifested its purpose to call into effect over the subject its exclusive power, although the congressional legislation may not at the time be actually operative, the power of the state in the premises would cease.

Northern Pac. Ry. v. *Washington,* 222 U. S., 371.

In Section 1 of the Hepburn Amendment of June 29, 1906, to Section 1 of the Interstate Commerce Act, the term "common carrier" was made to include "sleeping car companies," and the term "transportation" was made to include all "instrumentalities and facilities of shipment or carriage," and it was made the duty of every carrier subject to the Act to provide and furnish such transportation upon reasonable request, and to establish through routes.

By the Act of June 18, 1910 (36 U. S. Stats., p. 546, Chapter 309), Section 1 was further amended by making it the duty of all common carriers, among other things, to establish and enforce "just and reasonable regulations and practices affecting"—"tickets," "the *facilities* for transportation," etc., and every unjust and unreasonable regulation and practice "with reference to commerce between the states" was prohibited and declared unlawful.

Section 15, as is well known, gave the Commission jurisdiction to determine the reasonableness and validity of the carrier's regulations or practices, and to establish others if the carrier's regulations or practices were found to be unreasonable.

In *Kyle* v. *C. R. I. & P. Ry. Co.*, 182 Fed., 613 (C. C. A., 8th Cir.), a regulation of the railway company providing that certain through or limited trains would only stop at certain stations, was held to be reasonable, it not appearing that at other stations adequate facilities for travel on other trains were not afforded.

It would follow that the reasonableness of such regulation affecting interstate travel would be primarily for the Interstate Commerce Commission to determine under its power given under Section 15 of the Interstate Commerce Act to review a regulation made by the carrier under the 1910 amendment to Section 1.

Therefore, it would seem that the question whether the facilities afforded for interstate travel were sufficient or the regulations of the carriers therefor reasonable, was a matter for the primary determination of the Interstate Commerce Commission involving, as it would, an administrative function. In any event regulation thereof by the State is invalid.

In *Charleston & W. C. Ry. Co.* v. *Varnville Co.*, 237 U. S., 597, it was held that a state statute imposing a

penalty on carriers for failure to settle or adjust claims within forty days was an unconstitutional burden on interstate commerce and was also in conflict with the provisions of the Carmack Amendment to the Interstate Commerce Act; that when Congress has taken the particular subject matter in hand, coincidence of a state statute is as ineffective as opposition, and a state law on the same subject can not be sustained as a help to the Federal statute because it goes farther than Congress has seen fit to go. On page 604 Mr. Justice Holmes said:

> "It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived; and the fine of $50 is enough to constitute a burden. *Southern Railway* v. *Reid,* 222 U. S., 424, 443. But that is immaterial. When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. *Chicago, Rock Island & Pacific Ry.* v. *Hardwick Elevator Co.,* 226 U. S., 426, 435; *Southern Ry.* v. *Indiana Railroad Commission,* 236 U. S., 439, 446, 447."

In *C. R. I. & P. Ry.* v. *Hardwick Elevator Company,* 226 U. S., 426, the reciprocal demurrage law of Minnesota was held invalid since the enactment of the Hepburn Act and the provision therein in respect to delivery of cars for interstate shipment on reasonable demand.

Yazoo & Miss. R. R. v. *Greenwood Gro. Co.,* 227 U. S., 1-3.

New York Central R. Co. v. *Winfield,* 244 U. S., 147.

In *St. L. I. M. & S. Ry.* v. *Edwards,* 227 U. S., 265, the Arkansas demurrage statute requiring railways to give notice to consignee of arrival of shipments and penalizing them for non-compliance, was held an unconstitutional

interference with interstate commerce, so far as interstate shipments were concerned.

While in each of the above cases the matter was not specifically provided for in congressional legislation, yet it appears the general subject of interstate transportation and the providing of facilities therefor was intended to be regulated by the Interstate Commerce Law.

But while it was admitted by the Texas courts that the laws of that state did not require the railway company to furnish sleeping car accommodations, yet they seemed to determine that if such accommodations were furnished on the two trains in question for some other localities primarily for interstate travel, they should also be furnished for the people of Meridian at that place. While not openly expressed, there seems to be the concealed idea that not to do so would result in an unwarranted discrimination against this locality and, therefore, justify penalizing the railway company for a species of alleged discrimination not made unlawful by the statutes of Texas.

If that view of the order of the Railroad Commission is to obtain, then it would follow that such Commission attempted to base its order upon and to correct an alleged wrongful discrimination against Meridian in respect to interstate passenger traffic to and from that place, and by reason of such finding attempt to regulate traffic in respect to the two interstate trains in question. But any question of undue discrimination as between localities so far as interstate commerce may be concerned is regulated by Section 3 of the Interstate Commerce Law, that is, by the undue preference clause thereof, which includes not only traffic, but localities. But that section requires preliminary investigation, administra-

tive finding, determination, and order of the Interstate Commerce Commission to become effective.

United States v. *Pac. & Arctic Co.*, 228 U. S., 88, 106, 107.

By confining the administration of that section to the Interstate Commerce Commission, it is manifest that Congress has assumed jurisdiction and occupied the field by its own legislation to the exclusion of state action. Congress has delegated to the Interstate Commerce Commission power to determine and prevent all discrimination by interstate carriers in respect to or affecting interstate commerce.

Houston & Texas Ry. v. *United States*, 234 U. S., 343, 355, 356.

Under that view the order would be plainly unconstitutional.

3. *In any event should it be held that the order only incidentally and indirectly affected interstate commerce and that Congress had not yet shown its intent to cover the field, yet the order is invalid because under the facts disclosed it is impracticable, arbitrary and unreasonable as a restriction upon instrumentalities used in interstate commerce.*

However, should it be held that the order in question did not directly but only incidentally affect interstate commerce and that Congress has not yet evinced its intent to cover the general field, then it becomes necessary to determine whether or not the order or regulation is impracticable and unreasonable as affecting instrumentalities of interstate commerce, under the facts disclosed by the evidence.

Thus in *Adams Express Co.* v. *New York*, 232 U. S., 14, which involved the validity of a municipal license for express wagons and drivers, and certain qualifications in such drivers and provisions to insure careful driving, it was said on page 33:

> "It is also clear that regulations for this purpose, when the movement of interstate traffic is involved, should be entirely reasonable and should not arbitrarily restrict the facilities upon which it must depend."

Yazoo & Miss. R. R. v. *Greenwood Gro. Co.*, 227 U. S., 1-3.

Houston & T. C. R. R. v. *Mayes*, 201 U. S., 321, 329.

In *South Covington Ry.* v. *Covington*, 235 U. S., 538, regulations as to the number of cars to be run on an interurban interstate street railway, and the number of passengers allowed in each car between interstate points, were held to *directly* affect and burden interstate commerce and to be, therefore, void; that a regulation requiring a certain temperature in motor cars was held, under the facts, to be impracticable and unreasonable and, therefore, void.

So far as train service at Meridian was concerned the trains other than the two interstate trains were adequate. Thus, southbound train No. 15 left Meridian only 28 minutes after train No. 17, while northbound train No. 16 preceded No. 18 about 33 minutes. Outside of the question of sleeping car accommodations the local trains furnished adequate accommodations for Meridian, and if the Commission had power or jurisdiction in respect to sleeping car facilities it would seem that then it could only regulate the local trains by requiring the furnishing thereon of such accommodations. But that would afford no justification for interfering with the two interstate

trains in question. The order can not be regarded as otherwise than an unreasonable and arbitrary interference with interstate commerce. As the Texas Legislature has never authorized the Railroad Commission to regulate the sleeping car business and as it is optional with the roads whether or not to furnish such service, evidently the adequacy of train service under the state law could not be based upon sleeping car accommodations.

No doubt the residents of Meridian may be subjected to some inconvenience by reason of not being able to board these two trains at that point or to secure thereat the sleeping car conveniences. But mere inconvenience is not a sufficient justification to authorize a regulation which would materially hamper or interfere with the operation of these two interstate trains. One living in such a small town must expect to be subjected to more or less inconvenience because, from a practical and economical standpoint, it would not pay to furnish such convenience. The expense of furnishing such convenience would place an undue burden upon the business of transportation, which burden and expense would have to be borne by other localities and other traffic. The question of time in travel is not as important an element to one living in a small town as to one living in a large business center. The man in the country has more time on his hands than the man in the city. In the one case time is not an important element. In the other it generally is. The needs of this locality, so far as mere transportation was concerned, were amply met by the local trains which stopped at that town both in the morning and the afternoon, going in each direction. The two trains in question were essentially night trains so far as that locality was concerned. The average daily passenger business at that place, judging from the receipts or the tickets sold, was comparatively small and was amply accommodated by

the local trains. The only justification which seems to be offered for an interference with the operation of these two interstate trains was that they had sleeping car conveniences while the local trains did not. But if the state has not seen fit to impose an obligation upon the railways to furnish such facilities as a part of their duties and, therefore, has not empowered its Railroad Commission to require furnishing of the same upon local trains, it is difficult to see how this affords any reasonable ground or justification for the attempt to regulate interstate commerce or the operation of the two trains which were used primarily to accommodate such commerce. There would seem to be something radically wrong in the reasoning of the state courts and in the final analysis it seems they simply attempted to uphold the Railroad Commission in accomplishing in an indirect way what it had no power to do directly under the laws of the State.

The fact that by the voluntary act of the Railway Company local passengers were received and transported between points at which these two trains did stop cannot be regarded as affecting the question involved or as any justification for the Commission's regulation. The carriage of such passengers between such points and the stoppage of these two trains at such points was evidently justified by business conditions and in any event did not unreasonably interfere with or impede interstate transportation. As long as it had space on these two trains the Railway Company was probably obligated to take thereon such passengers as desired to travel between the points at which these trains stopped.

If the Railroad Commission could lawfully require these two trains to stop at Meridian, then it might require them to stop at all small towns and thus convert them into purely local trains which would necessitate the

putting on of two additional fast trains to accommodate and meet the requirements of interstate travel.

The Texas statute quoted in the "Statement," under which the Railroad Commission assumed to act, however, required the stoppage of all of the trains, as the number did not exceed four each way, at this county seat, irrespective of whether it might appear that one or two trains each way would be amply sufficient to accommodate the travel to and from that town. Such statute can be regarded as little less than purely arbitrary and unreasonable when applied so as to include the two interstate trains in question.

In *C. B. & Q. R. R. Co.* v. *Wisconsin Railroad Commission*, 237 U. S., 220, some phases of the question were considered and determined. There this court reversed the ruling of the Supreme Court of Wisconsin, sustaining an order of the State Railroad Commission requiring the stoppage of two passenger trains each way at the station of Cochrane. The order was made under a statute requiring every railroad company to stop at least one passenger train each day each way at such station if trains were run on the road to that extent, and if four or more passenger trains were run each way daily at least two passenger trains each day each way should be stopped at each and every station having a postoffice and containing 200 inhabitants or more. One local passenger and one local combination freight and passenger train each way stopped at Cochrane in the morning and the afternoon. The two trains in question were interstate limited trains which stopped at towns on each side of Cochrane, about eight miles distant therefrom. The interstate trains were run in competition with trains on other lines of railroad. The trial court had found that the passenger service at Cochrane was not adequate or reasonable. This court held the state statute was arbi-

trary, amounted to a regulation of and interference with and was a burden upon interstate commerce, and therefore, invalid. It was claimed that the residents of Cochrane and vicinity were unable to go north or south from that village by rail and return the same day; that the population tributary to Cochrane was about 3,000. On page 229 this court said:

> "Of course, there would be some convenience at times in two extra trains—indeed, in more than two —and they may be desired; but desire is not a test of requirement, nor is convenience, absolutely considered. There is a traffic to be considered which does not originate at Cochrane and its convenience cannot be put out of view."

On page 230 this court, speaking of the Wisconsin statute, said:

> "It does not determine service by the volume of the business of the villages of the state but by the requirements of business elsewhere, and limits such requirements, and, it may be, prevents them by the imposition of conditions which preclude their fulfillment. This is illustrated by the facts of the pending case. The interstate trains of the railroad are required by the necessities of its interstate business. It is in competition with shorter roads, and the speed of its trains, which cannot be safely increased, and their schedule time are a necessity in this competition."

In *Herndon* v. *C. R. I. & P. Ry. Co.*, 218 U. S., 135, the statute of Missouri requiring the stopping of all trains carrying passengers at the junction or intersection of other railroads was held to be a regulation of interstate commerce as applied to certain interstate trains of the railway company, it appearing that at the station or junction in question a morning and evening passenger train each way, two westbound and two eastbound, were stopped thereat. While it was contended by the state that the statute as amended only required the stoppage of trains at Lathrop carrying passengers destined for

points on the intersecting railroad, or to take up passengers at that place, and would not necessarily require the stoppage of all trains, yet this court held that the local trains afforded adequate accommodation and that the stoppage of interstate trains was to the detriment and hindrance of interstate traffic and, therefore, unlawful.

In *Atlantic Coast Line* v. *Wharton,* 207 U. S., 328, decided in 1907, this court reversed a judgment in mandamus entered by the Supreme Court of South Carolina compelling the railway company to stop certain of its through trains at a station called Latta in South Carolina as ordered or directed after a hearing by the Railroad Commission of that state. The answer set up that sufficient accommodations were already furnished the citizens of Latta and those residing along the Latta Branch Railroad; that the trains mentioned, Nos. 32 and 35, were interstate commerce trains running between New York and Tampa compelled to run at a high rate of speed in order to make connections; that they carried the United States mails and the trains were made up largely of through passengers; that there were two competitors for this through travel and it would be impossible to keep up the trains in competition with the other railroads if stops were to be made other than those absolutely necessary.

On the report of a referee the Supreme Court of the state decided that sufficient accommodations were not furnished citizens of Latta and along the Latta Branch Railroad, and thereupon ordered that passenger trains Nos. 32 and 35 should stop when flagged, with the alternative right to provide facilities substantially the same as those which would be afforded citizens of Latta by stopping said two trains on flag. From the testimony it appeared that Latta had a population, according to the last census, of 453. Clio, a small settlement on the Latta

Branch had a population of 508. Dunbar, on said branch, had a population of 115. The country back of these stations was a somewhat thickly settled agricultural country. It was also claimed for Latta that these places had increased in population since the last census. Several other trains stopped at Latta and the two trains in question could be boarded at Florence, a station on the same road distant 15 or 20 miles south, and at Dillon, 7 miles north of Latta. But that was claimed to be inconvenient.

In answer to the contention that some of the local trains were unfit, this court said on page 335:

> "These deficiencies are remediable by other means than the stoppage of the two trains in question. It is to be remembered that these two places, Latta and Clio, had together a population, by the last census, of about a thousand. Two ordinary modern trains of the usual passenger coaches would comfortably transport the total population of these places. The number of people who are inconvenienced by the non-stoppage of these trains is, of course, comparatively quite small."

On page 336 the court continued:

> "But assuming that the number actually inconvenienced by the want of fast trains was '*quite large*,' as said by some witnesses, it is perfectly evident the number would be small compared with the inconvenience of the much larger number of through passengers resulting from the stoppage of these trains at Latta and other similar stations in the State."

On page 337 the court continued:

> "Of course, it is not reasonable to suppose that the same facilities can be given to places of very small population that are supplied to their neighbors who live in much larger communities."

In *Mississippi Railroad Commission* v. *I. C. R. R. Co.*, 203 U. S., 335, injunction was sustained against an order of the Mississippi Railroad Commission requiring the stoppage of two through trains, Nos. 1 and 3, at Magnolia, a county seat, having a population of about 1200

inhabitants, it being claimed that Magnolia was one of the most progressive towns in the state. The bill showed that accommodations were afforded Magnolia by other trains, alleging that same were sufficient for the travel at that point. The Commission's order was made under the statute of that State providing, "Every railroad shall cause each and all of its passenger trains to stop for passengers at all county seats at which it has a depot, at the discretion of the railroad commission."

On page 346 this court said:

> "The order cannot be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes, as asserted. It is the question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such station. If the commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined and the train turned from a through to a local one in Mississippi. The legislature of a state could not itself make such an order, and it cannot delegate the power to a commission to do so, in its discretion, when adequate facilities are otherwise furnished.
>
> The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between States, both of passengers and freight. A wholly unnecessary, even though a small, obstacle ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals."

This court also referred to the opinion of the Circuit Court of Appeals in the same case, reported in 138 Fed., 327, for a full statement of the evidence and facts. The Railroad Commission had required two southbound trains

passing through Magnolia to stop thereat. It appeared that three other trains ran daily through Magnolia to New Orleans.

The Circuit Court of Appeals, page 333, said:

> "The citizens of Magnolia have not asked for such relief as could be granted them without interfering with the rights of others. They ask only to have trains Nos. 1 and 3 to stop. These trains were designed and scheduled for through travel, and to comply with government contracts to carry the mails from Chicago to New Orleans. If the statutes may be applied to stop through trains at Magnolia, they may be stopped at all stations in Mississippi. To require these trains to stop at all at Magnolia seems unnecessary and unreasonable. If the accommodations afforded are not adequate, why single out the through mail trains, and seek to convert them into local trains. Why not, under existing statutes, or statutes to be enacted, exert the police power of the state to improve the service by having better equipments on these three passenger trains now in use from Magnolia, and, if they are insufficient, by requiring other trains? The citizens of Magnolia are entitled to sufficient accommodations, and the state has the power to enforce the right; but when such right can be enforced otherwise it is unreasonable to do so by interfering with the rights of others equally entitled to the protection of the law."

While the Railroad Commission found that the facilities furnished at Magnolia were not sufficient this court, as well as the Circuit Court of Appeals, found otherwise.

In *Cleveland, etc., R. R. Co.* v. *Illinois*, 177 U. S., 514, this court reversed a judgment in mandamus entered by the Supreme Court of Illinois requiring the stopping of a regular passenger train known as the "Knickerbocker Special" at the City of Hillsboro, a county seat in Illinois, as required by a statute providing that "all regular passengers trains shall stop a sufficient length of time at the railroad stations of county seats to receive and let

off passengers with safety." The railway's answer had alleged that it had furnished four regular passenger trains each way daily stopping at Hillsboro which were sufficient to accommodate the travel to and from said city; that the Knickerbocker Special was put on to especially accommodate interstate travel between St. Louis and New York; that this train was in competition with trains on other roads and that the stoppage of such train would interfere with the operation of the train and such travel. This was held a complete defense and the statute held invalid as applied to such train. It is said on page 521:

> "The question broadly presented in this case is this: Whether a state statute is valid which requires every passenger train, regardless of the number of such trains passing each way daily and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train designated especially for local traffic may stop at the same station within a few minutes before or after the arrival of the train in question?
>
> * * * * *
>
> It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might in some cases, render it impossible for trunk lines running through the State of Illinois to compete with other lines running through States in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats it is difficult to see why the legislature may not compel them to stop at every station—a requirement which would be practically destructive of through travel, where there were competing lines unhampered by such regulations. While, as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise but who may have contributed largely to the construction of the road, they are bound to do

no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths or the excellence of their tables would insure them such share, if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this; the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it.

* * * * *

While the statute in question is operative only in the State of Illinois, it is obnoxious to the criticism made of the Louisiana statute in *Hall* v. *DeCuir*, 95 U. S., 485, that 'while it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. * * * If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others.' "

The same Illinois statute was involved in *Illinois Central R. R. Co.* v. *Illinois*, 163 U. S., 142, in which this court set aside a mandamus judgment of the state court requiring the railroad company to stop an interstate mail train at Cairo which would require a departure of a few miles from its main line. This court held the statute was an unconstitutional hindrance and obstruction of interstate commerce.

In *M. K. & T. Ry. Co.* v. *Town of Norfolk,* 107 Pac., 172, the Supreme Court of Oklahoma had before it an order of the Corporation Commission of that State requiring the railway company to stop its two fast through trains, Nos. 21 and 22, at Norfolk, a station on its line between Oklahoma City and Parsons, Kansas. The order of the Commission was held unreasonable and void and an interference with interstate commerce. Among other things the court said:

> "If the appellant is required by the order of the Commission to convert trains numbered 21 and 22 into local trains, that would necessitate an additional through passenger train each way to meet the demands of interstate traffic. This would occasion additional expense in the way of equipment, employes, maintenance, etc."

See also:

Ohage v. *Northern Pacific Ry. Co.,* 200 Fed., 128, 130 (C. C. A., 8th Cir.).

Only two other cases in this court need be noted. They are easily distinguished.

In *Gladson* v. *Minnesota,* 166 U. S., 427, a state statute was upheld requiring every railroad corporation to stop all regular passenger trains *running wholly within the state* at its stations at all county seats long enough to take on and discharge passengers. The Act did not apply to through railroad trains entering the state from another, or to transcontinental trains. No facts were shown under which it was claimed the application of the statute was an unreasonable interference with interstate commerce. It was simply contended that on its face the statute was unconstitutional. The operations of an interstate train were evidently not involved.

In *L. S. & M. S. R. R. Co.* v. *Ohio,* 173 U. S., 285, in an action to recover a penalty this court sustained as valid a statute of Ohio providing that "each company

shall cause three each way of its regular trains carrying passengers if so many are run daily, Sundays excepted, to stop at a station, city or village containing over three thousand inhabitants for a time sufficient to receive and let off passengers," etc. The facts were meager and it seems that but one train each way daily was stopped at West Cleveland which had a population of over three thousand. The bald contention seems to have been made that a statute requiring the stoppage of any through or interstate train was necessarily an interference with interstate commerce and, therefore, invalid. In the opinion the police power of the State is elaborately considered and it was finally held that in the absence of congressional legislation on the subject it could not be held that the statute was invalid as a regulation of interstate commerce. The question of the reasonableness of the statute as applied to the particular case was not apparently involved, as it appears, on page 298, that the Railway Company made the bald contention that a state regulation, which, to any extent or for a limited time, interrupted the continuous freedom of interstate commerce was forbidden although Congress had not then legislated on the subject. In that case there was a strong dissenting opinion. The ruling could hardly be extended to cases not strictly analogous.

Again, the amendment of 1910 to the Interstate Commerce Act, heretofore referred to, would seem to change the result. In any event, under the facts disclosed in this case, the Texas statute and order of the Railroad Commission made thereunder would seem to be an unnecessary and unreasonable interference with interstate commerce, and, therefore, invalid.

II.

THE PENAL STATUTE OF TEXAS, AS CONSTRUED AND APPLIED BY THE TEXAS COURTS, IN SO FAR AS ANY OR AT MOST MORE THAN ONE PENALTY COULD BE IMPOSED OR IN SO FAR AS PENALTIES COULD BE AND WERE IMPOSED DURING THE TIME THE VALIDITY OF THE RAILROAD COMMISSION'S ORDER WAS BEING JUDICIALLY CONTESTED AND UNTIL DETERMINED, WOULD BE VIOLATIVE OF THE FOURTEENTH AMENDMENT BY DENYING THE RAILWAY COMPANY THE RIGHT TO A JUDICIAL HEARING AND DETERMINATION WITHOUT RISK AND FEAR OF PENALTIES BEING IMPOSED AS A PUNISHMENT FOR CONTESTING THE VALIDITY OF THE ORDER OF THE COMMISSION.

The Texas statute under which the Commission's order was made requiring the stoppage of four trains each way at all county seats regardless of the amount of passenger traffic thereat, or whether a less number would be sufficient to reasonably accommodate the needs of that community, was obviously void on its face as applied to these interstate trains. But in any event neither such statute nor the order of the Railroad Commission made thereunder was conclusive of the validity of the same. It was subject to a judicial investigation and determination and the validity thereof under the view most favorable to the State was a question dependent upon the particular facts which might show the reasonableness or unreasonableness of the statute or order as applied to the two trains in question.

The Railway Company was entitled to a judicial investigation, hearing and determination of such question without undue burden or risk. The Texas statute (Article 6672, set out in the "Statement") imposing penalties for each alleged daily infraction of the order in respect to each train could only be intended to operate *in*

terrorem to prevent a contest and could not be held as according to the defendant the right to an orderly and fair hearing and determination. To impose any penalties for failure to obey such order before such determination would deprive the defendant of its property and rights without due process of law.

The very validity of the order itself was involved. That validity depended upon a judicial ascertainment and determination of involved questions of fact. Until a decision be made the Railway Company cannot be held concluded by the order, otherwise it would be denied the right to a preliminary judicial hearing. The situation is radically different from a case in which the validity of a statute is dependent upon matter of law which every one is assumed to know and not upon the ascertainment and determination of extraneous questions of fact which vary with the situation and the case. In the former case the only question which may be raised outside of matters of law is as to whether or not the law has been violated. That is not so, however, as to the latter situation.

Ex parte Young, 209 U. S., 123, 147.
Missouri Pacific Railway Co. v. *Tucker*, 230 U. S., 340, 349, 350.

It may well be that if the state laws in addition to a statute providing for the imposition of penalties for refusal to obey a commission's order also secure to the party against whom such order may be made, the right to contest the same in the State Courts and to have its operation stayed pending such contest and until a judicial determination be had, that if such party fails to assert such right or adopt such procedure then the validity of such order might be subject to a test in the penal action at the risk of a penalty, as was held in *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S., 651.

In that case, however, the suit was to recover but a *single* penalty and that was all that was involved. As a rule in such case penalties do not attach until after a judicial contest and for some failure thereafter. It may be true that under the federal constitution and Acts of Congress if the requisite jurisdictional amount could be shown the railway company might have gone into the federal court to contest the order. But that would hardly render valid the penal statute of the state if the state laws did not in themselves provide due process for a contest in court and a staying of the operation of the order until final determination of the validity thereof was had.

In *Missouri Pacific Railway Co.* v. *Tucker, supra,* suit was brought by a shipper for penalties which had accrued under a rate statute and the action was held not maintainable for any penalty because violative of the Fourteenth Amendment. Yet to contest such statute the Railway Company might have resorted to the federal courts in a comprehensive suit in equity against a representative number of shippers to have had the validity or invalidity of the rate statute there involved determined. While that procedure was not adopted it nevertheless rested its right of contest in the above case by way of defense to an action brought for penalties wholly upon the ground of the invalidity of the penal clause.

It is true that Article 6657 (Vernon's Sayles' Texas Civil Statutes, 1914, Volume 4) provides:

> "If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of compe-

> tent jurisdiction in Travis county, Texas, against said commission as defendant Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court," etc.

But no authority is conferred to stay the operation of the order in or pending such proceeding. On the contrary Article 6656 provides:

> "In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by articles 6657 and 6658 of this chapter."

See also *Mercantile Trust Co.* v. *Texas & Pacific Ry. Co.*, 51 Fed., 529, where the conclusive character of the commission's order under the above provision pending a final determination in a direct proceeding was pointed out.

In any event under Article 6657, the railway company was entitled to a reasonable time to institute such a proceeding, though its institution would under the statute be futile as to the operative effect of the order until final determination. In the meantime under the statute the order would be conclusive and effective.

But the state itself instituted the present proceeding for the enforcement of the order and the recovery of penalties within thirty days after the order became operative. In such proceeding the defendant set up grounds showing the invalidity of the order and the statute and the court proceeded to hear and determine the same. The Railway Company could hardly with propriety, after the institution of this suit, have instituted an independ-

ent one of its own either in that or some other tribunal questioning the invalidity of the order because the state court in this proceeding had acquired jurisdiction over the subject matter and was competent to determine the same. An independent suit to have the validity of the order tested had become unnecessary. If the Railway Company could only have its defense in the state's proceeding heard and determined at the risk of daily penalties being incurred and imposed during the progress of the hearing, would it not be as much deprived of its rights and of its property without due process of law as though the state had only permitted a determination to be had in a penal action alone and at the risk of incurring burdensome penalties while seeking an orderly and judicial determination of its rights?

We submit that no penalties could be imposed where the defendant within a reasonable time began to litigate, whether by suit or defense, the question of the validity of the order. Even if the defendant had been remiss where it might have proceeded in an independent suit, still if the question of reasonableness of the order were to be litigated in a penal action but one penalty could be imposed for failure to obey the order and no other penalties could accrue until the matter of the validity of the order was finally determined.

Indeed, it appears (Pr. Rec., 47) that the order in question was not signed by the Chairman of the Commission, indicating his non-concurrence therein. There was apparently such grave doubt as to the Commission's power that suit was promptly instituted by the attorney general for the purpose of testing the validity of the order and compelling by mandatory proceedings obedience thereto, if valid. The answer presented the issue which might have been presented in an original bill filed in the federal court for the purpose of securing such adjudication. We,

therefore, submit that within the reasoning of *Wadley Southern Railway* v. *Georgia, supra,* no penalties at all should have been imposed.

In any event it would not only be an act of injustice but a deprivation of the Railway Company's rights without due process of law, if, while the validity of the order was being judicially investigated and prior to a judicial determination thereof, penalties should be imposed for failure to obey the order involved during the period of such investigation. As the state had instituted this proceeding its control was within its power and it might hasten or delay the same pretty much at its own pleasure and to suit its own convenience.

We respectfully submit that the Texas statute, as well as the order of the Railway Commission thereon, in respect to the two interstate trains in question, was unconstitutional and invalid and that in any event it was erroneous in this proceeding in view of the matters in issue to impose any penalties, or in any view, to impose more than a single penalty if the order should be sustained as valid.

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APPENDIX.

DISSENTING OPINION OF COMMISSIONER L. J. STOREY AND ORDER OF THE TEXAS RAILROAD COMMISSION IN RESPECT TO PULLMAN CAR SERVICE INVOLVED IN THE CASE OF THE PULLMAN COMPANY VS. RAILROAD COMMISSION OF TEXAS, ET AL., UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

Office of

THE RAILROAD COMMISSION OF TEXAS.

AUSTIN, December 26th, 1906.

At a public hearing before the Railroad Commission of Texas at the November term, Cause No. 681, "Proposed order regarding operation of and schedule of charges for sleeping cars" was up for trial. Much evidence was heard and lengthy arguments made, the argument closing Friday evening, December 1st, when the case was taken under advisement by the Commission.

On December 22nd a decision was reached, and an order was issued: "Passenger Circular No. 10," in which, for reasons hereinafter stated, I cannot concur.

The Pullman Company, under contracts with the several railway companies in this state, furnishes the only sleeping car service on the roads in Texas, charging, as the uncontradicted testimony shows, the same rates for the accommodations furnished and services rendered that is charged by it in other states, and without discrimination against the people of Texas.

The Pullman Palace Car Company is not a common carrier under the Constitution and laws of Texas, and is, therefore, not under the jurisdiction of this Commission.

After a lengthy and somewhat exhaustive considera-

tion of the subject, an order has been issued by the Commission, approved, and signed by my associates, dated December 22nd, which reads as follows:

Office of

RAILROAD COMMISSION OF TEXAS.

Passenger Circular No. 10.

"Hearing No. 681.—Sleeping Cars. Proposed order regarding operation of and schedule of charges for November Term, 1906."

AUSTIN, TEXAS, December 22, 1906.

In pursuance of hearing had in the above entitled cause, and of due consideration given to the matters covered by the notice herein, to wit: Passenger Circular No. 8, of date November 5, 1906, the Railroad Commission of Texas is of opinion and finds as follows:

1. That the providing and hauling, by railroad companies operating lines of railroad in this state, of what, are known as Sleeping Cars, is a service fully contemplated by the laws of this state, and that such sleeping cars are within the meaning of Article Forty-Four Hundred and Ninety-Four of the Revised Statutes of Texas, reasonable and necessary facilities for the accommodation of the traveling public and patrons of such railroads, and constitute a part of the necessary equipment of the railroad companies using the same.

2. That the so-called sleeping car companies operating in Texas are merely subordinates and agents of the railroad companies over whose lines their cars are operated.

It is therefore ordered by the Railroad Commission of Texas:

1. That the sleeping car service now afforded by railroad companies operating lines of railroad in this state be continued, and that such present service be not hereafter curtailed, diminished or discontinued, except upon application to and the obtaining of the consent of this Commission.

2. That rates and charges to be assessed and collected, by railroad companies operating lines of railroad in this State, or their agents and those in direct charge of such cars, for the use by passengers of seats or berths, or

both seats and berths, in such sleeping cars, shall be in amount twenty (20) per cent. less than the present published rates contained in the Tariff or Rate Book filed with this Commission upon the hearing of this cause, and entitled "Sleeping and Parlor Car Rates in Southwestern Division, The Pullman Company, Revised October, 1903," and said to contain all published sleeping car rates between points in Texas.

3. That all railroad companies, over whose lines of railroad in Texas sleeping cars are now being operated, shall, on or before the date effective of this order, file with this Commission full and complete tariffs, on the plan of said above described Tariff or Rate Book, showing the rates and charges made and to be applied in accordance with the terms and provisions of this order; provided, that where new sleeper routes are hereafter established, the rates to be charged shall be authorized by this Commission on the application of the railroad over which such sleepers are to be operated.

4. That this order shall take effect and be in force on and after February 1st, 1907.

ALLISON MAYFIELD,
O. B. COLQUITT,
Commissioners."

Attest:
E. R. McLEAN,
Secretary.

The only complaint that I have ever heard is, that the charges made by the Pullman Car Company for the service they render is excessive, and the real, if not the only, object of this order, is to reduce these charges, which I sincerely wish could be legally and justly done.

Deeply regretting that I cannot, under my construction of the laws of this state, agree with my associates in the order issued, I believe it to be my duty to file with the records of the case my reasons for dissenting.

If we have jurisdiction over this or any other subject, we should not hesitate to assume it. If we have no jurisdiction, the assumption of it would be a usurpation of power which the courts and people of this country could

not and would not long tolerate, and on this point each Commissioner must satisfied his own conscience, and that I propose to do.

What Says the Law?

This order appeals to Article 4494 of the Revised Statutes of Texas for its authority. As to passenger traffic it reads as follows, viz.:

> "R. S. 4494. Every such corporation * * * run their cars for the transportation of passengers * * * at regular times to be fixed by public notice and shall furnish sufficient accommodation for the transportation of all such passengers * * * as shall, within a reasonable time, previous thereto, offer, or be offered, for transportation at the place of starting * * * at sidings and stopping places established for receiving and discharging * * * passengers, and shall take, transport and discharge such passengers * * * from and to such places on the due payment of the * * * fare legally authorized therefor."

The above question includes all that is said in the article which refers to passengers, and leaves out nothing but what is said about property.

I submit that this law is plain and easily understood. It provides alone for the "transportation" and "the payment of the fare therefor," and does not provide, even by implication, for anything else but "transportation" and "payment therefor."

Railroad companies are declared by the Constitution and laws of this state to be common carriers, and under the jurisdiction of the Railroad Commission of Texas. The Pullman Palace Car Company is not, under the Constitution and laws of this state, a common carrier, and not under the jurisdiction of this Commission, hence this effort to compel the railway companies to furnish sleeping cars and perform this service, not because any one

believes the railway companies can possibly furnish and render better or even as good service as does the Pullman Car Company, but because it is contended that the charges collected by the Pullman Car Company is too much for the service rendered, and as the Commission has no jurisdiction over that corporation, it is proposed to compel the railway companies, by order of this Commission, to assume the duties of a sleeping car company, in addition to their duties as common carriers.

This order presents three important questions, which must be answered in the affirmative, before the Commission can justify its issuance:

1. Has this Commission jurisdiction, under the Constitution and laws of this State, to make and enforce such an order?

2. And, if so, is it a duty prescribed or a mere authority, which the Commission may or may not exercise, as it may seem best for the country?

3. And in that case, should we, under existing conditions, exercise the power?

In considering this question, we must keep in mind this fact, as a proposition of law:

First Proposition.

That the Railroad Commission of Texas, like all other inferior courts and tribunals, have no jurisdiction, power or authority not expressly given to it by the law of its creation, or such as is necessarily implied under the grant of authority given it.

I need not quote from the great cloud of authorities to sustain this proposition. This construction is universal, and as old as the law itself, and is so thoroughly understood that no court of record, judge, or lawyer, will dare deny it.

Second Proposition.

A sleeping car service *is not a transportation service* and therefore not within the jurisdiction of this Commission. This proposition is supported by a great number of authorities, including State and Federal court decisions, and among them, decisions of our own Supreme Court. The case of *Duval* v. *The Pullman Palace Car Company*, 62 Fed. Reports, p. 268, was a Texas case, and the plaintiffs were citizens of the city of Austin. And the Federal Court has held that the Pullman Palace Car Company was "not engaged in the business of carrying passengers for hire," and the plaintiffs therefore failed to recover.

In the case of *Pollock* v. *The Pullman Car Company*, 69 Texas Reports, page 121, it was held by our Supreme Court that this sleeping car company could not be held liable as a common carrier.

In the case of *State of Texas* v. *F. W. & D. C. Ry. Co.*, 87 S. W. Rep., p. 336, it was held that the service rendered by the Pullman Palace Car Company is not a transportation service, and that the contract between the railway company and the Pullman Palace Car Company "did not in any way affect, or tend to affect, transportation or charges therefor."

It is thus seen that our courts hold that a sleeping car service is no part of the duty of a common carrier.

But why go beyond our own Constitution and laws creating the Railroad Commission of Texas to sustain the proposition that we have no jurisdiction to issue this order?

Section 2, Article 10, of the Constitution, authorizing the enactment of the Railroad Commission law, reads as follows:

> "SEC. 2. Railroads hereafter constructed or which may hereafter be constructed in this state are here-

by declared public highways, and railroad companies common carriers. The legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in the state, and enforce the same by adequate penalties, and to further accomplishment of these objects and purposes may provide and establish all requisite means and agencies, invested with such powers as may be deemed adequate and advisable."

The power and authority given to the Railroad Commission by the law of its creation is found in the Revised Statutes, Art. 4562, which reads as follows:

"ARTICLE 4562. The power and authority is hereby vested in the Railroad Commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs. The power to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in the state, and enforce the same by having the penalties inflicted, as by this chapter prescribed, through proper courts having jurisdiction."

Then follows twelve sections of said Article 4562, only one of which, Section 11, refers to charges authorized for passenger service. It reads as follows:

"SECTION 11. The commission shall made and establish reasonable rates for the transportation of passengers over each or all of the railroads subject hereto, which rates shall not exceed the rates fixed by law. The Commission shall have power to prescribe reasonable rates, tolls or charges for all other services."

It is thus seen that the Constitution authorized the legislature to delegate to the Commission certain specific and enumerated powers, viz.: "To regulate railroad freight and passenger tariffs."

While the "subject" as expressed in the caption of the

bill was to "establish reasonable freight and passenger tariffs," and in the body of the law the power given the Commission is to "adopt * * * and regulate railroad freight and passenger tariffs" * * * "to correct abuses, and prevent unjust discrimination and extortion." *In what?* "In rates of freight and passenger tariffs."

And in section eleven, treating specially of passenger service, the power is given to "establish"—what? Not a sleeping car service but "reasonable rates for the transportation of passengers," not to furnish luxuries, but transportation, and this reminds us of a rule of construction, which is recognized by all law writers, courts and profound lawyers, viz.: That "the enumeration of powers in a grant negatives the right of the grantee to exercise other and more extensive powers, as completely as if the law conferring the authority contained a clause forbidding the exercise of other powers."

The fact that sleeping car companies are not common carriers was fully recognized by the legislature of Texas when it enacted the separate coach law. R. S. Art. 4509, provides that "railroad companies doing business in this State as common carriers of passengers for hire, shall provide separate coaches for the accommodation of white and negro passengers, which separate coaches shall be equal in all points of comfort and conveniences," while Art. 4513 provides, in part, "that nothing herein contained shall be construed to prevent railroad companies in this State from hauling sleeping cars * * * attached to their trains, to be used exclusively by either white or negro passengers, separately, but not jointly."

Construing these sections of that law together, the conclusion is forced upon the mind that railroad companies being common carriers, are by this act forced to transport white and negro passengers in separate coaches, but

not forced to haul sleeping cars for the accommodation of either race, but were by this act permitted to do so. Mark the language, "to be used exclusively by either white or negro passengers." The Pullman Car Company not being a common carrier, under the laws of Texas, has the right to exclude any one, white or black, from its cars, and this right was fully recognized by the wording of this separate coach law.

It is also a recognition of the fact that a sleeping car service is not a transportation service, which a railway company can be forced to furnish, but they are permitted to haul these cars, provided by other corporations, which are not common carriers.

It is not contended that any railway company in this state is now performing the service of a sleeping car company. In fact, the notice given and ordered issued shows on its face that the object of this hearing was to force the railway companies to perform a service they are not now performing, and which, in fact, is being performed in this state only by the Pullman Palace Car Company, to whom alone the charges for such accommodations are paid.

The railway company being a common carrier, furnished transportation and collects pay therefor. The sleeping car company is not a common carrier, under the laws of Texas. It transports no one, and collects no charge for transportation, or anything else furnished or required to be furnished by a common carrier.

If a railway company can be required, under the laws of this state, as they exist, to furnish the luxuries now furnished by the Pullman Palace Car Company, who can say that they should not be required to furnish the passenger with his usual cocktail and mint julep to drink, meals to eat, cigars to smoke, and a porter to shine his shoes, as well as a bed to sleep on? There is as much

authority, in my judgment, for one as for the other—and none for either.

I think it must be conceded from the extracts we have quoted from the Constitution and laws of this state, that the legislature has never conferred, and never intended to confer, jurisdiction upon this Commission, directly or indirectly, to deal with the sleeping car service, and if there is still doubt in the mind of any one as to the proper construction to place upon the laws of Texas as to the Commission's jurisdiction in this matter, let me remind such a one that the construction placed by the legislature upon its own acts is the highest authority before the courts in any civilized country of its intention. And with this proposition in mind, I call attention to the fact that the proposition to confer this very power upon the Railroad Commission of Texas has several times been before the legislature of Texas, and has as often been voted down. Notably, in the 27th and 29th legislatures. In the 29th legislature the bill to confer power upon the Railroad Commission to fix the rates for sleeping car service was before the house of representatives on a motion to pass the bill to engrossment, the committee having recommended its passage. On a call of the roll, the passage of the bill was defeated by a vote of 70 to 29. See House Journals of February 24, 1905, page 494.

And thus we have an emphatic refusal on the part of the legislature of Texas to clothe this Commission with the power to deal with this subject, and in my judgment we should not attempt to usurp the power which the legislature of Texas has more than once emphatically refused to give us, and in which I think the Supreme Court of this state could not sustain us.

It is not contended by this Commission, or by any court here or elsewhere, that we have any jurisdiction over the Pullman Palace Car Company. It is, therefore, impos-

sible for this Commission to force it to allow its cars to pass out of its own control, or to lease or sell them to the railroads of Texas, and if not, how can our railroad companies supply themselves with cars of equal comforts and conveniences, which this order says shall not be "hereafter curtailed, diminished or discontinued?" Is it possible for any one who admits that we have no jurisdiction over the Pullman Car Company to entertain the idea for a moment that we can, without due process of law, force the Pullman Car Company to surrender the use and control of its sleeping cars to the railroads of Texas, without its consent, or at less profit than it is now getting?

But it is said that the Interstate Commerce Commission and the Commissions of some of the states have jurisdiction over sleeping car service. If so, it is by authority of the law given by Congress to the Interstate Commerce Commission, and by the acts of state legislatures to commissions in such states, and not by the assumption of a power not granted by the law-making power of the state.

As to the Second Question.

If we have jurisdiction, "it is a duty prescribed or a mere authority which the Commission may or may not execute as it seems best for the country."

It is seen by reference to the Railroad Commission Act, Revised Statutes, Art. 4562, the duties of the Commission are clothed in mandatory language. "The Commission shall" do so and so, relative to matters of transportation. But nowhere alludes directly or indirectly to the sleeping car service. Then, if we have the power at all, it is a mere discretionary power, which we may or may not assume, as to the Commission seems best, under existing circumstances. And this brings us to the question of a consideration of the

THIRD QUESTION.

Should we exercise the power if we have it?

In the first place, there is no general demand by the people for such action. We look in vain to the record in this case to find more than a few letters, and no other petition, for action in this direction, and on the trial of this cause no citizen or other person appeared before the Commission to ask for or defend the proposed action.

There is not a sleeping car on any railroad in Texas that does not belong to the Pullman Palace Car Company, a corporation, which is not a common carrier, and over which it is admitted the Commission has no jurisdiction whatever. We cannot, therefore, force it to sell or lease its cars to the railroad companies of Texas, or charge less for the service it renders. These palace cars, it is testified before us, average in value twenty thousand dollars apiece. How, then, can our Texas roads supply themselves with cars of equal convenience and comforts to "that the sleeping car service now afforded * * * be continued, and that such present service be not hereafter curtailed, diminished or discontinued," as required by paragraph one, in said order?

And again, the law says that if railway companies haul sleeping cars, white and black passengers must be accommodated in different cars, "equal in all points of comfort and convenience." R. S. 4509. And as sleeping car companies are not common carriers in Texas, they have the legal right to refuse to furnish a bed for a negro, which they could not do if they were common carriers.

It follows, therefore, as soon as the legislature shall compel the railroads in Texas to perform a sleeping car service, they must furnish, equip and operate a car for negro passengers for every one they operate for white passengers. For instance, the M. K. & T. Ry. Co. of

Texas hauls five Pullman cars out of Houston every night; one for passengers to Austin, one for San Antonio, one to Fort Worth, one to Dallas, and one to interstate points, and as these five go north, over five are going south, arriving at Houston the next morning, and if there is but one negro passenger from and to each of the destinations, he must have a sleeping car, if he demands it, and the carrier dare not run the risk of being without a car for his accommodation when he calls for it, even if the car of equal comfort and convenience costs $20,000 apiece.

So that the extra tax it is proposed in this way to levy on the roads in Texas is enormous, more than sufficient to supply the roads with freight cars sufficient to satisfy the great and crying demand for freight cars coming up to the Commission from every railroad station in Texas for empty cars to move the commerce of this great and growing state.

Are the earnings of the railroads sufficient to supply both, and if so, which of these demands shall we answer first? The demands of the very few for the luxuries of the sleeping car at a reduction of twenty per cent. under present charges, or the demands of the millions for the prompt movement of commerce, and the revival of industries shut down, and to which the masses must look for the necessaries of life?

The Commission should do what it can to relieve the present congested condition in which we find the commerce of this country involved at this time, and thereby revive crippled industries, build more roads, improve what we have, secure more sidetracks, more platforms, more freight cars, more and better engines. In short, require the expenditure of money by railway companies where it will benefit alike the people at large and the owners of the property, and let the sleeping car question

be passed to the foot of the docket to be considered when we have nothing of more importance to look after, or better still, let it be indefinitely postponed.

Very respectfully,

(Signed) L. J. STOREY,
Chairman.

I, E. R. McLean, Secretary of the Railroad Commission of Texas, hereby certify that the above and foregoing is a true and correct copy of dissenting opinion of Chairman Storey, in Cause No. 681, filed with the papers on December 26th, 1906.

Given under my hand and seal of the Railroad Commission of Texas, at Austin, this the 12th day of January, A. D. 1907.

(Signed) E. R. MCLEAN,
Secretary Railroad Commission of Texas.

JOINT RESOLUTION.

(Gammel's Reprint of the Laws of Texas, Vol. 9, p. 607.)

Requesting the Senators and Representatives of Texas in Congress to urge the passage of any bill now pending before the Congress of the United States, which has for its object the granting of the right of way through the Indian Territory to the Gulf, Colorado & Santa Fe Railroad Company, or to any reliable Company.

WHEREAS, the Gulf, Colorado & Santa Fe Railway Company purpose at an early day to extend its line of road from Ft. Worth, in Tarrant Co. or from any other point said Company may desire, northward to a point on the boundary of the Indian Territory, and through said Indian Territory and the State of Kansas on to Kansas City in the State of Missouri.

AND WHEREAS the building and extension of said Gulf, Colorado & Santa Fe Railway Company from and to the

points above named, will be of great commercial advantage to Texas, in that it will furnish a competing line with other railway lines already built and hereafter to be built through the Indian Territory, therefore:

SECTION 1. Be it resolved by the Legislature of the State of Texas, That the Senators and Representatives of Texas in Congress, be and they are hereby requested to urge the passage of any bill now pending in Congress having for its object the granting of the right of way through the Indian Territory to the Gulf, Colorado & Santa Fe Railway Company or to any reliable railway company.

SECTION 2. Be it further resolved That the Secretary of State be requested to furnish a copy of this resolution to each of the Senators and Representatives of Texas in the United States Congress.

Approved January 18th, 1884.

JOHN IRELAND,
Governor.

Office Supreme Court, U. S.
FILED
DEC 20 1917
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 158

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

STATE OF TEXAS,
Defendant in Error.

REPLY BRIEF

J. W. TERRY,
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Attorneys for Plaintiff in Error.

GARDINER LATHROP,
Of Counsel.

CHICAGO, December 13, 1917.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

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Defendant in Error.

REPLY BRIEF.

We do not deem it necessary to point out misapprehension or misconception on the part of the state of the points made in our opening brief.

As to the contention that only the validity of the order and not of the statute was involved a reference to the mandatory provisions of the statute in regard to stoppage of trains at county seats, set forth on page 2 of our opening brief, would show clearly that the validity of the statute as well as of the order was involved in this case. The statute was specifically relied upon in Paragraph 8 of plaintiff's original petition. (Pr. Tr., p. 5, and see pp. 83, 84.) The order was not discretionary

with the Commission. It was required under the statute, the validity of which was also involved.

C. B. & Q. R. R. v. *Wisconsin Railroad Commission*, 237 U. S., 220.

In determining the validity of the statute or order which in this case involves a mixed question of fact and federal law, this court, of course, would not be bound by any findings of the state court, but should determine for itself, under the evidence, the federal question involved.

Atlantic Coast Line v. *Wharton*, 207 U. S., 320.

C. B. & Q. R. R. v. *Wisconsin Railroad Commission*, 237 U. S., 226, 227.

Kansas City Southern Railway v. *Albers Commission Co.*, 223 U. S., 573, 591.

Oregon R. R. & N. Co. v. *Fairchild*, 224 U. S., 528.

Many alleged findings of fact are set out in the state's brief in detail. It will be seen that they are merely statements of evidentiary facts; some not relevant or material.

Lack of Pullman Service Only Relied Upon.

There was in addition to the testimony of witnesses also an agreed statement of facts (Pr. Tr., p. 45 *et seq.*) which is for consideration, and under such agreed statement it appears that, so far as train service was concerned, the local trains were adequate. (Pr. Tr., p. 48.) It is also beyond dispute that any finding of alleged inadequacy of facilities afforded Meridian was simply based upon the fact that the two interstate trains which did not stop there had Pullman accommodations, while the local trains which did stop there had not. That was the sole ground upon which the state courts proceeded in upholding the order. (See particularly 4th conclusion of law, Pr. Tr., p. 31; also p. 81.)

We showed that southbound train No. 15 stopped at Meridian 28 minutes after passing of No. 17, and northbound train No. 16 stopped there 33 minutes before passing of train No. 18. It would be absurd to require any better train service at Meridian. The 33rd and 34th findings (Rec., 27, 28) relied on by the state as findings of inadequacy of service are mere general conclusions and must be considered in connection with the specific findings (21st, 22nd, 24th, 25th, Rec., 25-26, and 35th, p. 28) which referred to absence of sleeper accommodations for Meridian passengers, and see the 37th finding (Rec., 28) that mail service at Meridian would be promoted by stoppage of trains Nos. 17 and 18. That would be merely a matter for the federal government. The Railway Company's contract with the postal department made all provision necessary in that respect. The court's conclusion was based wholly on the fact that the local trains did not carry Pullman cars, but even if trains 15 and 16 carried sleeping cars the statute would nevertheless require the stoppage of trains 17 and 18, as there were but four trains operated each way. This shows the arbitrary character of the statute.

That trains 17 and 18 were interstate is beyond dispute. Hull testified (Rec., 52):

> "The primary purpose intended to be subserved by trains Nos. 17 and 18 was to handle our through interstate business-through traffic. There is a great deal of competition for that business."

He showed the existing competition for interstate traffic. Nos. 15 and 16 run on about the same time as Nos. 17 and 18, made all stops, and were primarily intended to accommodate local or state traffic. As we showed, other competing lines to various interstate points were shorter, indicating the necessity for plaintiff in error to make fast time.

The state courts nowhere held that the state laws re-

quired the furnishing of such accommodations by the Railway Company. They simply held that because such accommodations were furnished upon these two interstate trains to other points and were not furnished upon the local trains at this point, therefore the Commission had the right to regulate the operation of the interstate trains.

Upon this proposition, as well as the proposition set out for the first time on page 23 of the state's brief, but which was not made the basis of the court's decision, namely, that the state statute prohibited discriminations against localities as well as persons, we suggest that all this would give the state or its Commission no jurisdiction or justification to impinge upon a federal right or usurp the federal power of regulating interstate commerce by attempting to interfere with the operation of the interstate trains upon any such ground. See:

Louisville & Nashville R. R. Co. v. *Eubank,* 184 U. S., 27.

Great Northern R. Co. v. *Minnesota,* 238 U. S., 340.

Missouri Pacific Ry. v. *Nebraska,* 164 U. S., 403.

Obviously, if the Pullman facilities were such as it was incumbent upon the Railway Company to furnish under the state law the only appropriate order which could be made, would be to require the furnishing of such facilities upon the local trains. But as we have shown, the state legislature has not yet conferred such power upon its Commission, and the failure to confer the same can hardly authorize them to place a burden upon interstate commerce.

It is claimed that the order simply involved a stoppage at this station of from three to ten minutes and was, therefore, negligible. That leaves out of consideration the time probably lost in slowing down and starting up.

But a similar claim was made in the cases cited by us and was disposed of adversely to the state.

Mississippi Railroad Commission v. *I. C. R. R. Co.*, 203 U. S., 346.

Orders of this nature are usually single, involving but one station in any single order. There is here involved a question of power in the premises and not merely one of expediency.

Stoppages at Other Places.

It is also claimed that the Railway Company voluntarily stops these two trains at other points having a smaller population both within Texas and in Oklahoma.

As to points in Oklahoma, we might say that, if true, it could involve only a claim if any of alleged discrimination in respect to interstate commerce, which was not for the consideration of the State Commission or its courts; and as to points in Texas, it may be said that there were no doubt justifiable reasons which actuated the company in so doing, as explained for instance in Mr. Hull's testimony. The stoppages were mainly to take water or on account of connections with other lines. (Pr. Tr., pp. 53, 54, 58.)

But there is no merit in the state's contention. Robertson, chief witness for the state and principal traveler out of Meridian, testified:

> "Moody is a good sized town. My understanding is that trains 17 and 18 do not stop at Moody, nor at McGregor. The conditions that apply at Meridian with regard to these two trains also apply at Moody, McGregor, Crawford and Valley Mills." (Rec., 70.)

Hull testified there were many other towns of more importance than Meridian at which these trains do not stop. (Rec., 57, 58.)

As to inability to make up loss of time required by such stoppages, he testified:

> "Now we have to run 60 to 65 miles an hour to maintain *the schedule*, upon part of the distance. Upon part of the district they can't make over 18 or 20 miles an hour, so to average 36 miles an hour they have to run at a high rate of speed down grades, and it is hard to make up any time; sometimes they pick up 5 minutes; 10 minutes is as much as they can make up.
>
> We necesarily have to maintain our schedule by not stopping at Meridian; that is one of the reasons. The other is that we have all the service needed there for the little business we do; we stop six trains there now." (Rec., 59.)

The time card put in evidence by the ~~Santa Fe~~ Sta (Rec., 64, 65) shows including Meridian and Morgan eleven towns between Temple and Gainsville, a distance of 193 miles, at which these trains did not stop, viz: Moody, McGregor, Crawford, Valley Mills, Meridian, Morgan, Blum, Rio Vista, Joshua, Justin and ~~Sayal~~. The record shows no other reason for requiring stoppage of these two trains at Meridian except that it was a county seat, and no particular reason on that account except mere convenience which would apply to the other stations as well and convert these two trains into local trains.

If these two trains were required to stop at all of the other points of equal or more importance than Meridian, at which they do not stop, it is manifest they could not maintain their schedules or their interstate connections. Hull satisfactorily explained each stop made by Nos. 17 and 18 between Galveston and Cleburne (Rec., 53, 54), and in no case was there a parallel with Meridian. Stops made at Milano, with a population of 500 (p. 14 of the state's brief) was to interchange cars with the I. & G. N. Railway which run between San Antonio and Kansas City. Stops would not have been made at Clifton (men-

tioned on p. 14 state's brief) but for the necessity of taking water.

As to Morgan, the time card offered in evidence by the state dated December 4, 1910 (Rec., 60, 63) shows no stop of either train, and the time card offered in evidence by the state dated August 18, 1912 (Rec., 64, 65) shows no stop for 18 at Morgan. Hull testified that at the time of the trial Clifton is now the only stop they make on the 100 miles and that is for water. (Rec., 53.) The 100 miles referred to being from Temple to Cleburne, on which Morgan is located. Moreover, Morgan is a junction point of the Texas Central Railroad, now part of the M. K. & T. railway system, which might justify stoppage there. Other places of stoppage are at cities of considerable size as well as junction points.

The state lays stress upon an improvident finding of the trial court that these trains, in detouring through Houston, run an extra distance of about 50 miles. The evidence is that such would be the case if the trains ran into Houston and out again over the company's own line, but they in fact run out over the Southern Pacific from Houston to Rosenberg, which makes an increased distance of only about 12 to 14 miles. (Rec., 57.) Houston is one of the four largest cities in the state, even larger than Galveston, and it is proper to run these extra 12 miles in order to participate in the interstate business of Houston.

As to stoppages in Oklahoma, which was apparently sprung at the trial, some of the towns were much larger than Meridian, there was no doubt necessity for taking water at other places, and presumably stoppages would not be made unless there was good reason therefor. Stoppages in Oklahoma, as stated, were not matters for consideration in this case.

It may also be added that such facts, if pertinent, and,

we submit, they are not, would not confer power or jurisdiction upon the State Commission to interfere with interstate commerce. Such facts merely tend to confuse the real question at issue, and are not pertinent to a decision of the question involved.

Penalties.

As to the penalties, it is contended that the state laws authorized the defendant to institute a suit to set aside the order and, pending final hearing, to have the enforcement of the same temporarily enjoined and actions for penalties restrained, and the case of *Railroad Commission* v. *Galveston, H. & S. A. Ry. Co.*, 112 S. W., 345, before the Court of Civil Appeals of Texas, is cited.

We do not understand that case to so hold. It is true it appears in the statement of that case that a temporary injunction had been granted by the trial court, yet the appeal was not therefrom, but from a final judgment entered upon the overruling of a demurrer and in which it was held that the order there involved was invalid and nonenforcible on the facts admitted. But the court stated it did not find it necessary to pass upon objections (probably based upon the point that Section 6657 authorized a suit against the Railroad Commission alone) to that part of the decree seeking to restrain the attorney general from bringing suits to enforce the statute prescribing penalties, because under the disposition of the case made, namely, the adjudication in respect to the invalidity of the order, it is said:

> "he certainly could not act to recover a penalty for the violation of an order which the court below and this court has determined should not, up to the final determination of this case, be enforced on the ground, as above said, that as to the facts existing up to the time of this judgment the order has been judicially ascertained to be unreasonable and unjust," etc.

That is, however, far from holding that in the state court the attorney general could be restrained from enforcing the penal statute prior to such adjudication.

That it was the intent of the Texas Legislature in passing the Railroad Commission Act of 1891, now constituting Chapter 15, Title 115, of the Revised Statutes of Texas, to prevent a staying of the order of the Commission pending final determination in the suit authorized to contest the same and thus putting the order immediately in effect, is plain not only from its language but also from the opinion of Circuit Judge McCormick rendered in 1892 in the case of *Mercantile Trust Co.* v. *Texas & Pacific Ry. Co. et al.*, 51 Fed., 529, and that was the understanding of this court of that and kindred cases as shown in its opinion in *Wadley Southern Railway Co.* v. *Georgia*, 235 U. S., on page 662.

Such view is also plainly announced in the case of *Texas & N. O. R. Co.* v. *Sabine Tram Co.*, 121 S. W., 256, on page 264, decided in June, 1909.

The same view of the purpose and intent of the act was expressed in a speech made April 21, 1892, by the Hon. James Stephen Hogg, who, as Governor, approved the Commission Act of 1891, which speech is reported in the volume containing the authorized publication of speeches and state papers of the Hon. James Stephen Hogg.

But it is further contended that in the suit filed by the state, plaintiff in error could have filed a cross bill under the Texas practice. But the Texas practice recognizes no distinction, such as was recognized under the old practice between legal and equitable remedies, and an answer subserves all of the purposes of the old cross bill and indeed of the statutory proceedings authorized by Section 6657 (pages 37 and 38, our opening brief), if the requisite facts are set up which would warrant relief.

The Railway Company in this case filed an answer which set up the requisite facts showing the invalidity of the order (Pr. Tr., pp. 7 to 10), so that it did challenge, as it might have challenged under the old fashioned cross bill, the validity of the order, and that was done in a reasonable time. Under such answer under the state practice it was entitled to such relief as the facts warranted. The suit should not, therefore, have proceeded as one for the recovery of penalties pending an investigation and adjudication of the validity of the order involved.

Indeed, our contention that under the Texas practice the answer is in effect in lieu of the old-fashioned cross bill, and indeed of the statutory proceeding prescribed by Section 6657, is borne out by the case (decided before this case was heard in the trial court) cited on page 43 of the state's brief (for which we wish here to acknowledge our indebtedness), namely: *State* v. *St. L. S. W. Ry. Co. et al.*, 165 S. W., 492, Paragraph 2 of the Syllabus, and page 496. Indeed, if the ruling in that case, while awarding a mandamus yet denied the right to recover penalties, had been followed, no penalties could have been imposed in this case in any event. See Paragraph 12 of Syllabus, and page 499.

That decision but accentuates the injustice and illegality of the penalties or of any penalty imposed in this case for asserting the privilege of seeking to contest the validity of the order.

We admitted, in our opening brief, that if the requisite jurisdictional amount could be shown, we might have asserted in the federal courts the remedy given by the federal laws, but we submitted this was not sufficient and did not show that the state statute would not be wanting in due process of law if the state itself had not afforded an adequate remedy.

We submit there was no safe, adequate and secure remedy available under the Texas statute to test, in the state courts, the validity of the order.

On the other hand, we assert that the Railway Company within a reasonable time set up its rights in the suit which was promptly brought by the state to enforce the order, and it had the right to suppose, as it did, until judgment was rendered, that this suit was of a friendly nature, intended to test and settle a very doubtful question (Paragraph 10 of Motion for New Trial, p. 16, and 10th Assignment of Error, p. 36, and pp. 92, 93), and that in such suit the validity of the order would first be determined and adjudicated before it could be subjected to these extraordinary penalties, and then only for subsequent violations. The state should not insist upon the imposition of penalties merely under a quibble as to the appropriate procedure. Matters of substance and fair play should control mere matter of form.

Respectfully submitted,

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No. 158.

In the Supreme Court of the United States

OCTOBER TERM, 1917

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The statement of this case made by plaintiff in error is incomplete and inaccurate.

The order of the Railroad Commission of Texas involved in this case was entered on March 11, 1912 (Pr. Tr., p. 3), but the same did not become effective until April 2, 1912. (Pr. Tr., p. 4, line 3.) This suit to enforce the order and to recover penalties for its violation was filed May 1, 1912. (Pr. Tr., p. 2.) At any time after March 11, 1912 (or on March 11, 1912) the plaintiff in error could have filed suit either in the (State) district court of Travis county, or in the district court of the United States (Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362, 391-392) to contest the validity of the order and to have it set aside for unreasonableness, for lack of due process, for interference with interstate commerce, or for any other invalidity; and the court in which suit may have been filed could have immediately, by temporary injunction issued with or without notice, suspended the operation of the order pending the final determination of the validity of the order; this right and privilege flowed from the

terms of Article 6657, Revised (Civil) Statutes of Texas, 1911, copied on pages 37 and 38 of the brief for plaintiff in error, and from the general equity powers of the courts.

On page 38 of the brief for plaintiff in error it is said: "But no power is conferred to stay the operation of the order in or pending such proceeding"; as already pointed out, the courts are vested with full authority to stay the operation of these orders immediately, and with or without notice, and in view of the fact that counsel who sign the brief have filed numerous cases both in the State and Federal courts and have had various orders of the Railroad Commission of Texas stayed without notice and both before and after their effective dates, it is somewhat remarkable that the impression is now sought to be left with this court that such relief cannot be had under the Texas statute. Illustrative of the efficacy of the remedy for preliminary review given by the Texas statute, we refer to the case of G., H. & S. A. Ry. Co. vs. Railroad Commission of Texas, 112 S. W., 345, 346: in this case, the Commission made an order on July 20, 1907, effective August 1, 1907; suit was immediately filed by the railway company to test the legality of the order, and on July 23rd, a restraining order was entered staying the enforcement of the same, and, on appeal, the judgment granting the stay was affirmed. It must be clear, therefore, that plaintiff in error had the right under the Texas statute to have the order reviewed in a direct proceeding on and after March 11, 1912; this privilege it did not take, but awaited until after May 1, 1912, and until after this suit had been filed, to make any question thereof. This, we think, was a "reasonable time" for the purpose.

The order involved was made under the authority granted in Article 6676, Revised Statutes, 1911 (copied on page 2 of the brief for plaintiff in error), and the questions involved pertain to the validity of the *order*, and not the validity of the *statute*, the statute, in so far, at least, as this case is concerned not being self-executing: the suit was brought to enforce the order, and not to enforce the statute.

The order simply required the plaintiff in error to stop its southbound train, No. 17, and its northbound train, No. 18, at the county seat station of Meridian each day long enough to receive and discharge passengers. (Pr. Tr., p. 3.) At the time the order was made the plaintiff in error did not operate three other trains each way per day through Meridian, as stated in its brief, but it only operated two other trains each way per day. This is found as a fact by the Court of Civil Appeals. (Pr. Tr., p. 80.) These "other trains" were scheduled for Meridian as follows: Southbound, No. 11, 7:56 p. m.; No. 5, 10:38 a. m.,—No. 17 being scheduled to pass through Meridian at 11:20 p. m. (see 13th, 14th and 15th findings of fact, Pr. Tr., p. 25); northbound: No. 6, 5:25 p. m.; No. 12, 9:03 a. m., and No. 18 (northbound) was scheduled to pass through Meridian at 5:25 a. m. (See 13th, 16th and 17th findings of fact, Pr. Tr., p. 25.) The other trains, No. 15, southbound, and No. 16, northbound, were not put on until January 9, 1913. (See 17th and 18th findings of fact, Pr. Tr., p. 25.) From the first day of August, 1911, up until January 9, 1913, there were but two trains each way per day scheduled to stop at Meridian, as shown above. (Tr., p. 48, paragraph "Fifth.") None of the trains scheduled to stop at Meridian carried sleeping car or Pullman service (see 21st finding of fact, Pr. Tr., p. 25),—except that trains Nos. 11 and 12, on June 1, 1913, began to carry sleepers to and from Waco (Pr. Tr., p. 25),—Waco being a point about sixty miles south of Meridian, on a line of the St. Louis Southwestern Railway Company, over which line the plaintiff in error operates a branch line service between Waco and McGregor, Texas. (Pr. Tr., p. —.)

Attention is here called to the fact that no penalty was assessed against plaintiff in error for failure to stop either train No. 17 or train No. 18 at Meridian *on any day when more than two other trains, each way, were stopped there;* that is to say, the days on which Nos. 17 and 18 were stopped at Meridian, under the circumstances shown in the fourth finding of fact (Pr. Tr., pp. 19-21) copied below, were excluded, each of the days on which trains

Nos. 15 and 16 were stopped there were excluded, and all Sundays were excluded. (See 41st finding of fact, Pr. Tr., p. 29; 7th conclusion of law, Pr. Tr., p. 32.)

The trial court (Pr. Tr., p. 31, paragraph 4), the Court of Civil Appeals (Pr. Tr., p. 80), and the Supreme Court of the State (Pr. Tr., pp. 154-155) all found, as a matter of fact, that the service provided at Meridian by the plaintiff in error, exclusive of trains Nos. 17 and 18, was and is inadequate properly to serve the traveling public at that place. This court, in the case of C., B. & Q. Ry. Co. vs. Wisconsin R. R. Comm., 237 U. S., 233, thus referred to and discussed the opinion and decision of the Court of Civil Appeals *in this case:*

"*Gulf, Colorado, etc., Ry. vs. State,* 169 S. W. Rep. (Texas), 385, was an action for penalties imposed by a statute of the State upon any railroad failing to obey an order of the Commission of the State. The order required the railway company to stop two numbered trains at the town of Meridian, a county seat. It had a population of 1500. The defense of the company was an attack on the order as an unlawful and direct interference with interstate commerce, the trains being interstate trains, and the local facilities, it was asserted, being adequate. The case was considered in view of the established principles which we have stated and the order was sustained, the court deciding that the local facilities were inadequate and the order not a direct interference with interstate commerce."

The plaintiff in error nowhere attacks the specific findings of fact made by the trial court,—approved by the appellate courts,—but simply attacks the general findings of fact, or, rather, conclusions of law, that the local facilities were and are inadequate. Hence, since these specific findings of fact are unassailed,—and are amply supported by the evidence, if assailed,—and since they underlie the general finding or conclusion attacked, we deem it appropriate here to set them forth at length:

"Second. That the city of Meridian was and is the county seat of Bosque county, Texas, and was and is incorporated under

the general laws of the State of Texas, as a city having one thousand inhabitants and over, and now has a population of about 1500." (Tr., p. 18.)

"Fifth. The following one-way, round-trip, and coupon tickets were sold to passengers by defendant at its station at Meridian, Texas, for the months named:

"31.

"Month.	Single trip		Round trip		Coupon	
1911. No.	Amount.	No.	Amount.	No.	Amount.	Total.
April ..379	338.20	98	179.35	33	93.80	$ 611.35
May ..403	327.67	115	286.13	46	154.35	768.15
June ..222	400.15	155	229.20	37	106.00	735.25
July ..478	451.30	245	326.55	55	159.40	937.25
Aug. ..506	585.75	124	302.20	82	611.50	1,499.45
Sept. ..473	389.90	135	241.60	49	184.95	816.45
1913.						
Jan. ..405	382.35	128	224.30	37	155.00	761.65
Feb. ..338	358.50	146	259.35	36	102.95	720.80
Mch. ..400	360.50	183	297.55	26	104.65	762.70

"One-way and round-trip tickets were sold by defendant at Meridian for the months named as follows:

Oct., 1911	....one-way, 468; round-trip, 638,—value,	$1,094.31
Nov., 1911	....one-way, 480; round-trip, 204,—value,	848.64
Dec., 1911	....one-way, 530; round-trip, 248,—value,	822.36
Jan., 1912	....one-way, 324; round-trip, 84,—value,	396.97
Feb., 1912	....one-way, 298; round-trip, 121,—value,	468.80
Mar., 1912	....one-way, 358; round-trip, 195,—value,	732.60
April, 1912	...one-way, 464; round-trip, 166,—value,	662.33

"The defendant received revenue from the sale of tickets at Meridian, Texas, for the months named below as follows:

June, 1912	$ 747.67
July, 1912	1,059.45
August, 1912	1,331.45
September, 1912	913.10
October, 1912	1,121.65
November, 1912	1,445.10
December, 1912	875.10

April, 1913	775.75
May, 1913	780.85

"32.

"The following one-way and round-trip tickets were sold by defendant to passengers destined to Meridian for the months named:

	One-way.	Round-trip.	Value.
May	368	136	$440.70
June	443	97	520.40
July	475	118	580.50
August	478	97	461.00
September	588	374	894.25
October	396	104	492.70
November	437	106	539.45
December	443	290	674.55
January	334	127	389.15
February	277	94	404.65
March	333	155	500.55
April	425	163	570.30

"That during the year beginning with May, 1911, there were sold tickets at the stations named below as follows:

Station.	Amount.
Alvin	$29,469.83
Bellville	12,540.47
Caldwell	20,847.56
Cameron	41,141.07
Clifton	16,729.20
Milano	14,818.17
McGregor	22,054.85
Rogers	20,764.21
Rosenberg	18,750.73
Sealy	19,930.75
Somerville	21,809.18
Wallis	9,186.64

"And that the population of said last named places as shown by the United States census of 1910 was as follows:

Alvin	1,453
Bellville	1,250

Caldwell 1,476
Cameron 3,263
Clifton 1,137
Milano 500
Morgan 831
McGregor 1,864
Rogers 1,275
Rosenberg 1,198
Sealy 2,250
Somerville 2,070
Wallis 1,000

"33.

"That defendant stops its trains Nos. 17 and 18 at those stations named below: At Alvin, Caldwell, Cameron, Clifton, Milano, Morgan, Rosenberg, Sealy, Somerville, and Wallis.

"For the months comprising the year ending with May, 1913, the defendant received revenue from the sale of tickets at the stations named below, as follows:

Month.	Moody.	McGregor.	Valley Mills.	Clifton.
June, 1912	$ 1,446.56	$ 2,194.75	$ 867.80	$ 1,441.59
July, 1912	2,181.75	3,382.30	1,332.30	2,278.96
Aug., 1912	2,299.50	4,368.90	1,495.15	2,743.66
Sept., 1912	2,144.95	2,693.80	1,164.45	1,955.23
Oct., 1912	3,965.00	4,444.85	1,357.64	2,352.85
Nov., 1912	2,598.60	3,463.05	1,254.08	2,449.92
Dec., 1912	2,197.40	3,474.45	1,017.80	1,775.55
Jan., 1913	1,306.95	1,896.55	789.15	1,248.01
Feb., 1913	1,115.10	1,768.60	683.50	1,424.14
Mar., 1913	1,322.95	1,790.00	951.15	1,879.14
April, 1913	1,122.40	1,932.25	781.50	1,339.14
May, 1913	1,489.78	2,453.90	1,024.90	1,589.62
Total	$23,290.93	$33,832.90	$12,719.42	$22,478.62

"35.

"Thirteenth. Train No. 17 is a southbound passenger train scheduled to pass through the town of Meridian daily at 11:20 p. m. Train No. 18 is a northbound passenger train scheduled to pass through Meridian daily at 5:25 a. m. (Tr., p. 25.)

"Fourteenth. On each of the days between April 2, 1912, and

June 27, 1913, defendant operated through the town of Meridian, Texas, its southbound passenger train No. 11, which was scheduled to arrive and stop at Meridian at 7:56 p. m. This train runs between Purcell, Oklahoma, and Temple, Texas. (Tr., p. 25.)

"Fifteenth. On each of the days between April 2, 1912, and June 27, 1913, plaintiff operated its southbound passenger train No. 5 through the town of Meridian. This train was scheduled to arrive at the station in the town of Meridian at 10:38 a. m. daily. This train runs between Purcell, Oklahoma, and Galveston, Texas. (Tr., p. 25.)

"Sixteenth. On each of the days between April 2, 1912, and June 27, 1913, defendant operated through the town of Meridian its northbound passenger train No. 6, which was scheduled to arrive at and stop at the station in Meridian at 5:25 p. m. daily. This train runs between Galveston, Texas, and Purcell, Oklahoma. (Tr., p. 25.)

"Seventeenth. On each of the days between April 2, 1912, and June 27, 1913, defendant operated through the town of Meridian its northbound passenger train No. 12, which was scheduled to arrive at and stop at Meridian at 9:03 a. m. daily. This train runs between Temple, Texas, and Purcell, Oklahoma. (Tr., p. 25.)

"Eighteenth. On each of the days between January 9, 1913, and June 27, 1913, defendant operated through the town of Meridian its northbound passenger train No. 16, which was scheduled to arrive at and stop at Meridian at 4:52 a. m. This train only stops at Meridian when flagged. It runs between Temple, Texas, and Cleburne, Texas. (Tr., p. 25.)

"36.

"Nineteenth. On each of the days between January 9, 1913, and June 27, 1913, the defendant operated through the town of Meridian its southbound passenger train No. 15, which was scheduled to arrive at and stop at Meridian at 11:48 p. m. This train runs between Cleburne, Texas, and Temple, Texas. (Tr., p. 25.)

"Twentieth. Prior to January 9, 1913, for three or four months defendant ran two sections of trains Nos. 17 and 18, which performed the same service as trains Nos. 15 and 16. These second sections stopped at Meridian. (Tr., p. 25.)

"Twenty-first. Prior to June 1, 1913, none of the passenger trains operated by the defendant carried sleepers or Pullmans south of Cleburne, Texas, except trains Nos. 17 and 18. Since

June 1, 1913, trains Nos. 11 and 12 carry a sleeper to and from Waco, Texas. This is "the Waco service." (Tr., p. 25.)

"Twenty-second. A passenger going from Meridian to any point south, if trains Nos. 17 and 18 are not stopped at Meridian, cannot get Pullman or sleeper service out of Meridian on any of the defendant's trains; that is to say, in order to get a sleeper or Pullman service south a passenger would have to go to Temple on train No. 11, leaving Meridian at 7:56 p. m. and arriving at Temple at 10 p. m. and there await for the arrival of train No. 17 due at 1:05 a. m., or he could leave train No. 11 at Clifton at 8:17 p. m. and there await the arrival of train No. 17 at 11:36 p. m., or he could by private conveyance drive through the country twelve or thirteen miles from Meridian to Clifton and there board train No. 17 at 11:36 p. m. (Tr., pp. 25, 26.)

"Twenty-third. A passenger from the north cannot get Pullman or sleeper service into Meridian, if trains Nos. 17 and 18 are not stopped there. If he desires this service he must leave train No. 17 at Cleburne, Texas, at 9:50 p. m. and take some other train into Meridian, or he must pass through Meridian to Clifton and there leave the train and catch some other train back into Meridian, or drive through the country. (Tr., p. 26.)

"Twenty-fourth. A passenger from the south to Meridian cannot get Pullman or sleeper service to Meridian if trains Nos. 17 and 18 are not stopped there. If he desires this service he must use train No. 18 to Temple, disembarking there at 3:50 a. m. and catch some other train into Meridian, or else he may disembark from No. 18 at Clifton at 5:28 a. m. and catch train No. 12 at 8:45 a. m. for Meridian or drive through the country from Clifton to Meridian. (Tr., p. 26.)

"Twenty-fifth. On account of their inability to get sleeper or Pullman service out of Meridian except upon the conditions described, many passengers desiring such service travel to Waco over the line of the defendant company at an added expense, and there take trains of some other company which furnish sleeper and Pullman accommodation. (Tr., p. 26.)

"Thirtieth. Many people desiring to take trains Nos. 17 and 18 at Meridian, on account of the failure of these trains to stop there, drive through the country by private conveyance twelve or fifteen miles to Clifton or seven or eight miles to Morgan, and take the trains at one of the other of these places. For this reason a con-

siderable proportion of the revenue shown to be derived by defendant from its passenger business at Clifton is revenue that would be derived by defendant on its passenger business at Meridian if these trains stopped at Meridian. Many passengers on trains Nos. 17 and 18, on account of the failure of these trains to stop at Meridian, disembark therefrom at Morgan or at Clifton and there drive through to country to Meridian, or else wait for some train that stops at Meridian. (Tr., p. 27.)

"Thirtieth. Many people desiring to take trains Nos. 17 and 18 at Meridian, on account of the failure of these trains to stop there, drive through the country by private conveyance twelve or fifteen miles to Clifton, or seven or eight miles to Morgan, and take the trains at one of the other of these places. For this reason a considerable portion of the revenue shown to be derived by defendant from its passenger business at Clifton is revenue that would be derived by defendant on its passenger business at Meridian if these trains stopped at Meridian. Many passengers on trains Nos. 17 and 18, on account of the failure of these trains to stop at Meridian, disembark therefrom at Morgan or at Clifton and there drive through the country to Meridian, or else wait for some train that stops at Meridian. (Tr., p. 27.)

"Thirty-first. The passenger trains of defendant are scheduled to stop at Clifton as follows: No. 11, 8:17 p. m.; No. 17, 11:36 p. m.; No. 5, 10:56 a. m.; No. 6, 5:08 p. m.; No. 11, 5:28 a. m.; No. 12, 8:45 a. m.; and are scheduled to stop at Morgan as follows: No. 11, 7:41 p. m.; No. 17, 11:05 p. m.; No. 5, 10:16 a. m.; No. 6, 5:47 p. m.; No. 12, 9:18 a. m. (Tr., p. 27.)

"Thirty-second. Trains Nos. 11, 12, 5, 6, 15 and 16 are each and all trains doing purely local service and stopping at all stations between their respective termini. None of these trains carry sleepers south of Cleburne except as hereinbefore stated with reference to trains Nos. 11 and 12, and the remainder of the equipment on each and all of these trains is much inferior to the equipment carried on trains Nos. 17 and 18. (Tr., p. 27.)

"Thirty-third. Prior to January 9, 1913, the service furnished to the traveling public at Meridian, exclusive of trains Nos. 17 and 18, and exclusive of the days on which trains Nos. 17 and 18 were stopped there, was wholly inadequate to serve the needs of the traveling public. (Tr., p. 28.)

"Thirty-fourth. Continually since the second day of April, 1912,

the service and accommodations furnished by the defendant at Meridian, exclusive of trains Nos. 17 and 18 was wholly inadequate to serve and accommodate the comfort and convenience of the traveling public except on the days when trains Nos. 17 and 18 actually stopped at Meridian as stated above. (Tr., p. 28.)

"40.

"Thirty-fifth. Many residents of Meridian and vicinity make trips to points in other States than the State of Texas and return. Exclusive of trains Nos. 17 and 18 these passengers have no access to any through train of the class or equipment of Nos. 17 and 18. (Tr., p. 28.)

"Thirty-seventh. Trains Nos. 17 and 18 carry United States mail. Exclusive of train No. 17 the residents of Meridian and vicinity have access to only one mail train southbound, daily, which train passes Meridian at 10:33 a. m. In order to post mail destined to points south of Temple after 10:33 a. m. each day, residents of Meridian are compelled to place the mail on northbound train No. 6, which passes Meridian at 5:25 p. m. and let it be carried in this case north to Cleburne and there be transferred to southbound train No. 17. The residents of Meridian and vicinity have access only to one northbound mail train daily, and that is train No. 6, passing Meridian at 5:25 p. m. The order of the Railroad Commission ordering the stoppage of trains Nos. 17 and 18 at Meridian is an aid to the interchange and passage of the United States mail by virtue of the conditions stated hereinbefore. (Tr., p. 28.)

"Forticth. Both trains Nos. 17 and 18 carry interstate passengers, both of these trains also carry a large number of interstate passengers between each and all of the points where they stop in Texas, the proportion as between interstate and intrastate traffic on these trains is not disclosed. The defendant at one time made a practice of transporting a passenger who desired to take either train No. 17 or No. 18 from Meridian to Cleburne on another train, free of charge, and allowed such passenger on his return trip to Meridian to leave trains Nos. 17 or 18 at Cleburne and then be transported from Cleburne to Meridian on another train of the defendant free of charge. This practice has been abrogated by the defendant and now a passenger taking those trains under such conditions is compelled to pay his regular transportation charges both ways between Cleburne and Meridian. The

passenger fare one way between Cleburne and Meridian is $1.10 and the round trip fare is $2.00." (Tr., pp. 28, 29.)

As stated before, there is no attack made upon the findings of specific facts, and we assume that it is neither necessary nor proper to state the evidence which amply supports each and every one of them.

On page 8 of their brief, counsel for plaintiff in error say: "There was virtually no dispute as to the salient facts. The other trains (than Nos. 17 and 18) afforded sufficient transportation facilities. The sum and substance of the complaint was simply that people living in Meridian, when they desired to use a Pullman sleeper or travel at night, were inconvenienced in being required to go to the station above or below Meridian and there await the fast train." If by "salient facts," as used in this expression, is meant the specific facts found by the trial court, and approved by the appellate courts, we are prepared to agree with the first sentence just quoted. But we agree to the correctness of neither of the other statements. That the "other transportation facilities,"—independent of the question of Pullman or sleeping car service,—was and is inadequate is specifically found by the State courts. (See the 33rd finding of fact, Pr. Tr., p. 28, quoted above.) Both the evidence and the findings of fact affirmatively show that "the sum and substance of the complaint" *was not* "simply that peope living in Meridian, when they desired to use a Pullman or sleeper or travel at night, were inconvenienced in being required to go to the station above or below Meridian and there await the fast train." The evidence shows and the courts found that the transportation service, in and of itself, was and is adequate.

Nothing can be found in the order to justify the assumption indulged by plaintiff in error that it was intended to interfere with interstate commerce; each of the three State courts found that such was not its purpose. (See Pr. Tr., pp. 31, 81.) Nor can anything be found in the order or the evidence to support the

proposition that the order operates to burden commerce; the contrary, we think, is conclusivey shown. The trial court found specifically that it had no such effect, but that insofar as it might affect commerce at all it was in aid of interstate commerce. (Pr. Tr., p. 28, 34th and 35th findings of fact; 2nd conclusion of law, Pr. Tr., p. 31.) The record shows that there are interstate passengers desiring to take these trains at Meridian and that there are interstate passengers desiring to leave these trains at Meridian. (Pr. Tr., p. 28.) Counsel for plaintiff in error argue that if these trains can be compelled to stop at Meridian they can, also be compelled to stop at all other stations in Texas; but there is nothing to warrant this supposition; in the first place, we are dealing with a specific order only requiring them to stop at the one place, and if another order should be made requiring them to stop at other stations, it will then be time to test the validity of the further orders; in the second place, the portion of the statute under which this order was made deals only with *county seat stations*, and the record shows that plaintiff in error voluntarily stops these trains at every county seat station in Texas except Meridian. (Pr. Tr., p. 24, 6th finding of fact.) According to the uncontradicted evidence, and the unassailed findings of fact, the maximum burden and delay which can be caused by the enforcement of the order is the following: "four or five minutes" per day per train. (Pr. Tr., p. 59.) Plaintiff in error voluntarily delays these trains and the equipment thereof at numerous other places and under circumstances which indicate that the slight delay at Meridian would be wholly immaterial. For instance, these trains are scheduled to stop at every station in the State of Oklahoma, regardless of the population tributary to the stations or the amount of business (Pr. Tr., p. 18, 2nd finding of fact); illustrative of this, the trains are scheduled to stop at Thackerville, Okla., a town of a population of 154; Overbrook, Okla., with a population of 118; Berwyn, Okla., with a population of 378; Dougherty, Okla., with a population of 278; Paoli,

Okla., with a population of 239; Wayne, Okla., with a population of 332. (See 2nd finding of fact, Pr. Tr., p. 18.)

The paintiff in error, if it desired, could easily make up the slight delay at Meridian on the hundred mile division between Temple and Cleburne, Meridian being intermediate. K. S. Hull, its division superintendent, testified that five or ten minutes can be made up in the run over this division. (Pr. Tr., p. —.)

A detour of forty-eight or fifty miles is voluntarily made in the route of these trains in order that they may pass through Houston, Texas. (Pr., Tr., p. 24, 10th finding of fact.)

Part of the equipment of these trains,—that is, the sleepers from Kansas City to San Antonio, Texas,—is delayed at Fort Worth, Texas, for three hours and thirty-five minutes. (Pr. Tr., p. 26, 26th finding, 57.)

These trains, as already stated, are voluntarily stopped at every other county seat station on the line in Texas. (Pr. Tr., p. 24.)

These trains are voluntarily stopped at many other stations in Texas, many of which are smaller than Meridian; for instance, at Morgan, with a population of 831; Clifton, with a population of 1137 (Pr. Tr., p. 24); Milano, with a population of 500. (Pr. Tr., p. 24.)

At Alvin, Texas, some forty miles from Houston, train No. 18 picks up the passengers brought to Alvin from the north by train No. 5; and these passengers sometimes have to wait at Alvin for fifty or sixty minutes (Pr. Tr., pp. 24, 57); according to the testimony of Mr. Hull, division superintendent for plaintiff in error, "No. 18 picks up No. 5's connection—that is, people from the north going to Houston get on No. 18 at Alvin." (Pr. Tr., p. —.)

During the month of November, 1912, No. 18 was advertised as stopping at Meridian. (Pr. Tr., p. 90.)

The equipment of trains Nos. 17 and 18 is constanty shifted en route; the trains, in no sense, retain their physical identity throughout their interstate journeys, or throughout their trips within the State; the manner in which this equipment is changed, we think, negatives the idea that these trains are the "fast through"

trains as claimed by plaintiff in error. Certainly, in view of the many voluntary delays to which they are subjected, there is no basis for the proposition advanced that the loss of three or ten minutes at Meridian would directly burden interstate commerce. We deem it appropriate here to set forth the findings of specific facts in respect to these matters, made by the trial court, which findings are fully supported by the evidence, which findings are approved by the appellate courts of the State, and which findings, as we understand the record, are not attacked by plaintiff in error.

"Sixth. Both trains, Nos. 17 and 18, are scheduled to stop and do stop daily at every county seat town on the line of defendant in Texas, except Meridian. (Tr., p. 24.)

"Seventh. Both train No. 17 and train No. 18 are scheduled to stop and do stop daily at Clifton, a town twelve or thirteen miles south of Meridian, in Bosque county. Clifton has a population of 1137. The trains usually take water at Clifton, but the principal reason for their stoppage there was and is on account of the revenue derived from passenger business there. (Tr., p. 24.)

"Eighth. Defendant stops its trains Nos. 17 and 18 daily at Morgan, another town in Bosque county, Texas, about seven miles north of Meridian, and having a population of 831 in 1910. (Tr., p. 24.)

"Ninth. Defendant stops trains Nos. 17 and 18 at the towns of Alvin, Caldwell, Cameron, Milano, Rosenberg, Sealy, Somerville, Wallis, Bellville, Brenham, Temple, Cleburne, Fort Worth, Houston and Gainesville, all in the State of Texas. (Tr., p. 24.)

"Tenth. In order to have trains Nos. 17 and 18 go through the city of Houston, defendant causes them to leave its main line and run over a branch line and a line of another road into and out of Houston, the extra mileage of this detour being forty-eight or fifty miles. (Tr., p. 24.)

"Eleventh. Both train No. 17 and train No. 18 are by defendant regularly scheduled to stop daily at every station in the State of Oklahoma between the Texas State line and Purcell, Oklahoma, the names and populations of such stations and towns being as follows:

	Population.
Thackerville	154
Marietta	1,546
Overbrook	118
Ardmore	8,618
Berwyn	378
Daugherty	278
Wynnewood	2,032
Pauls Valley	2,689
Paoli	239
Wayne	332
Purcell	2,740

(Tr., p. 24.)

"Twelfth. During the month of September, 1912, train No. 18 was regularly scheduled by defendant, and advertised to the public, to stop daily at Meridian, but it was not stopped at said place on any day during said month, and the employes in charge of said train were ordered by defendant not to stop it at Meridian. (Tr., p. 25.)

"Twenty-sixth. A drawing room sleeping car operated by defendant between Kansas City and San Antonio, southbound, is brought from Kansas City to Fort Worth by train No. 11, due to arrive at Fort Worth at 5:20 p. m. daily. It is then placed in train No. 17 due to leave Fort Worth at 8:55 p. m. and carried by it to Milano Junction, due to arrive there at 2:48 a. m. The car is there set out to be carried thence by the International & Great Northern Railway Company. A sleeping car operated by defendant, southbound, between Fort Worth and San Angelo is carried by train No. 17 from Fort Worth to Temple and is there set out to be carried thence by train No. 77. The sleeping car operated by defendant between Dallas and Galveston, southbound, is carried from Dallas to Cleburne by train No. 68, arriving at Cleburne at 9:50 p. m. and is there picked up by train No. 17 at 10:15 p. m. and carried to Galveston. (Tr., p. 26.)

"Twenty-seventh. The sleeping car operated by the defendant northbound, between Galveston and Dallas, is carried from Galveston to Cleburne by train No. 18, arriving at Cleburne at 6:50 a. m., and the car is carried from Cleburne to Dallas by train No. 67, leaving Cleburne at 7:05 a. m. The sleeping car operated by defendant northbound, between San Antonio and Kansas

City is carried by the International & Great Northern Railway Company to Milano Junction, and is there picked up by train No. 18 and carried to Fort Worth, arriving at 8:10 a. m., where it is set out and later picked up by train No. 12 at 11:30 a. m. and carried north. The sleeping car operated by defendant from San Antonio to Fort Worth is brought by train No. 78 to Temple, arriving at Temple at 12:40 a. m., and is there picked up by train No. 18 at 4 a. m. and carried north to Fort Worth. (Tr., pp. 26 and 27.)

"Twenty-eight. During the summer months between the first of June and the first of October of each year train No. 18 carries a sleeping car from Galveston to Fort Worth, and there delivers it to the Fort Worth & Denver City Railway Company to be carried to Denver. (Tr., p. 27.)

"Twenty-nine. At Milano Junction train No. 18 picks up a chair car brought from San Antonio to the International & Great Northern Railway Company. No. 17 also sets out a chair car at Milano Junction to be carried to San Antonio by the International & Great Northern Railway Company at Cleburne, Texas. Both trains Nos. 17 and 18 change engines and crews. Both trains are reswitched and No. 18 picks up some baggage cars and express cars. Prior to January 9, 1913, No. 18 picked up an express car at Temple, and No. 17 set out an express car at Temple. The equipment of train No. 18 when it leaves Galveston, Texas, is a mail car, first and second class coach and two sleepers, and during the summer months an additional sleeper is added to be delivered to the Fort Worth & Denver City Railway Company at Fort Worth. (Tr., p. 27.)

"Thirty-sixth. The order of the Railroad Commission ordering the stoppage of trains Nos. 17 and 18 is an aid to interstate commerce in so far as such commerce arises at or is destined to Meridian. (Tr., p. 28.)

"Thirty-eight. It would require four or five minutes loss of time daily to stop train No. 17 at Meridian for the receipt and discharge of passengers and mail. This is the average length of time required to stop a train of the same character as train No. 17. It would require the loss of about ten minutes time to stop train No. 18 at Meridian for the receipt and discharge of passengers and mail, and the stoppage of either or both trains Nos. 17 and

18 is not an unreasonable burden upon the defendant, but is a reasonable regulation and requirement. (Tr., p. 28.)

"Thirty-ninth. There are a large number of towns other than county seat towns on the defendant's line in Texas where trains Nos. 17 and 18 stop for the receipt and discharge of passengers. The principal reason for the stoppage of these trains at those points from the standpoint of the defendant is the revenue to be derived at those points. (Tr., p. 28.)

"Forty-fourth. When train No. 18 leaves Galveston it carries one mail car, one coach, one sleeper for Dallas to be set out at Cleburne, one sleeper for Kansas City, one sleeper for Fort Worth to be delivered to the Fort Worth & Denver Railway Company. At Milano Junction it picks up one sleeper for Kansas City to be set out at Fort Worth and one chair car for Kansas City. This sleeper and chair car having been brought from San Antonio by the International & Great Northern Railway Company.

At Temple it picks up a sleeper for Fort Worth, same having been brought from San Angelo by train No. 78.

At Cleburne the train changes engine and crew, is reswitched and picks up some baggage and express cars. It sets out the Dallas sleeper brought from Galveston.

At Fort Worth it sets out a sleeper from San Angelo, picked up at Temple. It sets out a sleeper for Kansas City from San Antonio, picked up at Milano Junction. It sets out the mail car and picks up another mail car.

Between Fort Worth and Purcell the equipment is as follows: One mail car picked up at Fort Worth, baggage and express cars (picked up at Cleburne), one chair car (for Newton, Kansas, from Galveston), one sleeper (from Galveston to Kansas City). The only equipment in the train when it arrives at Purcell that was in the train when it left Galveston is the Newton, Kansas, chair car and the Kansas City sleeper.

At Purcell the Newton, Kansas, chair car, the Galveston-Kansas-City sleeper and the San Antonio-Kansas City chair car are delivered to the Atchison, Topeka & Santa Fe Railway Company, and these cars are carried thence in a train of the latter company bearing number 18-8.

At Wichita, Kansas, this train picks up one sleeper for Kansas City.

At Newton, Kansas, this train sets out the chair car from Gal-

veston and picks up one sleeper for St. Joseph, Missouri, to be set out at Topeka.

At Topeka, Kansas, the train sets out the St. Joseph sleeper.

The only car that was in the original train No. 18 when it left Galveston that is carried north of Newton, Kansas, is the Galveston sleeper. The Kansas City chair car, picked up by train No. 18 at Milano Junction, is carried north of Newton in this train. (Tr., p. 30.)

At Kansas City the San Antonio chair car and the Galveston sleeper and the sleeper picked up at Wichita, Kansas, are set out.

From Kansas City to Chicago train No. 18-8 is made up of entirely new equipment, consisting of a cafe-observation car, Pullmans, etc., picked up at Kansas City. (Tr., p. 31.)

"Forty-fifth. The only passenger car equipment in train No. 17 when it leaves Purcell that is brought south from Kansas City or other points, is the Kansas City-Galveston sleeper and the Kansas City-San Antonio chair car.

At Fort Worth No. 17 picks up a Kansas City-San Antonio sleeper, the same having been brought to Fort Worth by train No. 11. It also picks up a sleeper for San Angelo to be set out at Temple. At Cleburne or Temple it sets out the express cars, and at Milano Junction it sets out the Kansas City-San Antonio sleeper and chair car, having changed engines and crews at Cleburne. (Tr., p. 31.)

"Forty-sixth. At Alvin train No. 18 picks up the passengers of the defendant who have gone to Alvin on train No. 5 and who are destined to Houston. (Tr., p. 31.)

"Forty-seventh. A portion of defendant's interstate passengers between Kansas City and San Antonio and Galveston come down to Fort Worth on the sleeper hauled to that place by train No. 11, which arrives at Fort Worth at 5:20 p. m. and are carried thence on train No. 17, which leaves Fort Worth at 8:55 p. m. (Tr., p. 31.)

"Forty-eighth. To require trains Nos. 17 and 18 to stop at Meridian for the purpose of receiving and discharging passengers is not, and will not be an unreasonable burden upon the defendant, or delay to its said trains, but is a reasonable requirement and will greatly serve the needs, comfort and convenience of the traveling public, and the residents of Meridian and vicinity." (Tr., p. 31.)

ARGUMENT.

1. *The effect of the order is, reasonably, to promote the convenience and well-being of the intrastate travelers to and from Meridian, and its effect is not, unreasonably or unlawfully, to burden or regulate interstate commerce.*

To say that the order, if given effect, will serve the convenience of the traveling public in and out of Meridian is but to state what is self-evident. To say that the State,—at least in the absence of conflicting Federal legislation,—has the right to provide regulations of carriers, and to apply such regulations even to trains actually engaged in interstate commerce, when such regulations are calculated to promote the safety and convenience of the traveling public, and when the same are not intended to and do not directly or substantially burden interstate commerce, is but to repeat what this court has held in cases too numerous to mention. That the convenience of the traveling public affords as valid ground of the regulation as does the public health or safety is settled, we think, by this court in Railway Co. vs. Ohio, 173 U. S., 292; in Escanaba Co. vs. Chicago, 107 U. S., 678, and in Atlantic Coast Line R. R. Co. vs. North Carolina Corporation Commission, 206 U. S., 1. Under the uncontradicted facts of this case, and under the unassailed findings by the State courts, the order directly and substantially promotes the convenience of the travelers,—both State and interstate,—who may have occasion to travel from or to Meridian. And while this is true, there is nothing to warrant the assumption that the Commission was seeking to regulate the matter as to the interstate traffic; the benefits accruing to the interstate travelers flowing as a necessary incident from the operation of the order in favor of the State traffic. The mere fact that the order necessarily operates to benefit and aid interstate commerce in this way cannot be held to make it a regulation of interstate commerce; such was not its purpose, its effect upon commerce being merely incidentally beneficial; in this aspect of the question, the regulation occupies the position of the regulations involved in New York, N. H. & H. R. R. Co. vs. New York, 165

U. S., 628; Lake Shore & Michigan Ry. Co. vs. Ohio, 173 U. S., 285; Atlantic Coast Line vs. Georgia, 234 U. S., 280, 291, and the regulations upheld by this court in South Covington Ry. vs. Covington, 235 U. S., 537. In New York, N. H. & H. Ry. Co. vs. New York, supra, this court said of the regulation there in question: "So far as it may affect interstate commerce, it is to be regarded as legislation *in aid* of commerce and enacted under the power remaining with the State to regulate the relative rights and duties of all persons and corporations within its limits." The trial court found as a fact that the regulation here involved, in so far as it affected interstate commerce at all, was in aid thereof (Pr. Tr., p. —), and this finding was pursuant to the testimony which showed that interstate travelers desired to use the trains in question in going to or from Meridian. (Pr. Tr., p. —.) It certainly cannot be the law that a State regulation, simply because it may have an indirect and beneficial effect upon interstate commerce, is to be regarded as a direct regulation of or interference with the latter.

Counsel for plaintiff in error seek to demonstrate the interference with interstate commerce by showing that the stoppage of the trains at Meridian will entail delay. Pretermitting the question of the power to compel the necessary delay if the local facilities are inadequate, it may here be observed that the delay will be but slight,—so slight, in fact, as to render it, intrinsically considered, negligible, and so slight as to make the many voluntary delays to which these trains and the passengers are subjected appear to be substantial and unreasonable. The maximum burden of which the order is susceptible is a three-minute stop for train No. 17 and a ten-minute stop for train No. 18. This is the utmost extent of the supposed burden upon interstate commerce. The pretension that it is a substantial and direct burden is almost ridiculous; it becomes altogether absurd when it is remembered that these supposed "fast" trains are stopped at every village, hamlet and town on the company's line in the State of Oklahoma, and when it is remembered that they are voluntarily stopped at

every county seat station in Texas,—many of them smaller than Meridian,—and that they are voluntarily stopped at Clifton, a town of 1137 population, and the first station north of Meridian, at Morgan, a town of 831 population, and the first station south of Meridian, and at many other non-county seat towns of smaller population. That the trains are not the "fast" through trains, upon which no delay can be imposed, without substantially burdening the interstate traffic, as claimed, is conclusively refuted, we think, by the facts shown in the statement of the case above.

The three-minute "burden," small as it is, was not imposed arbitrarily or unreasonably. These trains are not operated alone for the carriage of interstate passengers,—as was the case of the train involved in C., C., C. & St. L. Ry. Co. vs. Illinois, 177 U. S., 514,—they carry a large number of intrastate passengers,—in fact, the number of intrastate passengers may and probably does exceed the number of interstate passengers,—the proportions as between the State and interstate passengers is left undisclosed; defendant in error had no means of showing the proportions; the plaintiff in error was possessed of this information but did not put it in the record. Mr. Hull, division superintendent, testified that "on trains Nos. 17 and 18 we carry intrastate passengers between Houston and Galveston; we carry intrastate passengers between Galveston and Alvin, between Alvin and Rosenberg, between Rosenberg and Bellville, between Bellville and Somerville, and between Temple and Cleburne,—in fact, we carry a large number of intrastate passengers between each and all of the points where we stop in Texas in the operation of trains Nos. 17 and 18. However, I haven't any idea about how many interstate passengers we carry on these trains." (See Pr. Tr., p. —.) The order requiring the stoppage at Meridian will promote intrastate as well as interstate travel, and under the uncontroverted evidence the slight delay necessary can more than be made in the hundred-mile run between Temple and Cleburne. (Pr. Tr., p. —.) Intrinsically cosidered, therefore, we submit the proposition that the regulation is a reasonable one, one well calculated to serve,

substantially, the convenience of the traveling public, and one which does not throw any unreasonable burden upon the carrier or upon commerce.

The trial court found as a fact that the transportation facilities afforded at Meridian generally were and are inadequate (Pr. Tr., p. —, —— finding) and, also, that the same were inadequate because a passenger to or from the station could not procure Pullman or sleeping car service on any train scheduled to stop there. (Pr. Tr., p. —, —— finding.) The findings of fact, and portions of the evidence upon which they are based are set forth in the statement of the case, and the same will not be here repeated. These findings were all approved by the appellate courts of the State, and the findings of specific facts are not really contested before this court. We think the specific facts found, and shown by the evidence, are amply sufficient to warrant the conclusion that the "other facilities" were inadequate. If this be true, counsel for plaintiff in error admit that the regulation is a valid one even though it might impose some burden upon interstate traffic.

But counsel say that the lack of Pullman service is not a lack of adequate facilities for the reason, they say, that they are not required to furnish sleeping car service by the Texas law. But this is a question of State law which has been resolved against them. The question is not whether a rail carrier can, as an original proposition, be required to furnish sleeping car service to any or all of its patrons; we think it can be compelled to do so, else, under modern conditions, it would not furnish proper and adequate service. But the question of State law is: Can a railway company furnish sleeping car service to certain localities and to certain portions of the traveling public without furnishing it for all who may apply so long as its capacity is not taken up? The State statute prohibits discrimination against persons, classes of persons, and against localities (see Article 6670, R. S., 1911); the common law, and the Constitution of Texas, requires equality of treatment. The State courts in this case decided, upon the

uncontroverted facts, that the plaintiff in error owed to the travelers to and from Meridian the duty, under the State law, to furnish sleeping car service, and to permit them the opportunity of procuring the advantages of this service. Under the unquestioned facts of the case all opportunity to use this service is denied to these travelers because the only trains upon which it is afforded do not stop at Meridian. For this reason,—and for other reasons already stated,—the State courts decided that the "local facilities" were wholly inadequate, and this presents, we think, a decision upon State law which is not reviewable in this court.

Patterson vs. Colorado, 205 U. S., 460.

Palmer vs. McMahon, 133 U. S., 660.

Kelly vs. Pittsburg, 104 U. S., 78.

New York vs. Roberts, 171 U. S., 658.

Armour Packing Co. vs. Lacy, 200 U. S., 226.

Manley vs. Park, 187 U. S., 547.

Insurance Co. vs. Needles, 113 U. S., 574.

Fox vs. Cincinnati, 104 U. S., 783.

Stone vs. Southern Illinois Bridge Co., 206 U. S., 267.

If, therefore, the plaintiff in error is liable under the State law to furnish sleeping car service under the conditions shown,—as held by the State courts,—it would seem to be clear that the entire failure to do so would render its service at Meridian inadequate, irrespective of other facts or questions involved in this case. And that this court cannot, on writ of error, re-examine the requirement of the State law on this subject, is, as we understand the decisions, held in the cases just cited.

2. *There is no Federal legislation in conflict with the order, nor has Congress shown an intent to cover this field of regulation.*

In Southern Railway vs. Reid, 222 U. S., 436, 437, this court announces the rule to be that those attacking State regulations upon the ground that Congress has occupied the field must "find *specific action* either by Congress in the Interstate Commerce Act or by the (Interstate Commerce) Commission covering the matters

which" the State seeks to regulate. (See, also, Missouri Pacific Ry. Co. vs. Larrabee Mills, 211 U. S., 612.

Counsel for plaintiff in error seek to meet this rule by pointing to Section 1 of the Hepburn Amendment of June 29, 1906. But, as is apparent from the act to regulate commerce, as thus amended, transportation wholly within a State and the furnishing of facilities therefor are expressly excepted from the operation of the act,—except in so far as a case may be presented where a discrimination,—within the meaning of Section 3,—arises out of the relation of State and interstate regulations. No such case is presented here; it is not even claimed that the order involved, in so far as it may operate to require the furnishing of sleeping car service, involves any discrimination against interstate commerce. On page 18 of their brief, counsel, also, refer to the amendment of June 18, 1910, but the act to regulate commerce, as thus amended, operates only with respect to interstate traffic, except in the contingency stated immediately above. The act to regulate commerce nowhere undertakes to vest jurisdiction in the Interstate Commerce Commission to regulate or prevent discrimination *against intrastate commerce;* if the idea of discrimination is at all involved in this case, the discrimination, under the undisputed facts, is against intrastate traffic and not against interstate traffic. In so far as discrimination can be found at all, the order simply, by its incidental effect, requires the carrier to afford the intrastate traveler the *same*,—not a greater,—privilege as is afforded the interstate traveler. It has never been contended that the Interstate Commerce Commission has any power to set aside or affect a State regulation where there is no discrimination against interstate traffic, nor that it may compel removal of discrimination against intrastate traffic. And it must be clear that the facts of this case afford no controversy cognizable by that Commission. Nor is there any warrant in the act to regulate commerce, as amended, for the proposition that the Interstate Commerce Commission has exclusive,—or even any,—jurisdiction over the question of the reasonableness or adequacy of facilities fur-

nished for traffic wholly within a State. In the regulation here in question, the Railroad Commission of Texas was dealing alone with intra-state commerce,—the effect of its action, if any, upon interstate commerce being purely incidental. Counsel for plaintiff in error, we think, have not found any "specific action" by Congress "covering the matters" sought to be regulated here, nor does any such "specific action" exist. The cases cited by them, we think, either do not support the proposition at all, or else they are easily distinguishable on the facts.

They cite Kyle vs. C., R. I. & P. Ry. Co., 182 Fed., 613. This was an ordinary damage suit brought by an individual who rested his right to recover upon the mere failure of the defendant to stop a particular train at a small station, he having remained on the train after he had been informed that it would not stop at the station and after he had been furnished an opportunity to leave the train and take another whereby he could have avoided the injuries alleged. There was no order by an administrative board, having jurisdiction of the matter, requiring the train to stop, which order, if it had been made, would have been prima facie reasonable. Besides he did not attempt to show that the other facilities afforded him were inadequate. Besides,—the facts were that the station there in question was a very small one having only three or four families of people, a postoffice and one store,—the presumption being that adequate facilities were furnished for a station of this kind. They cite Charleston & W. Ry. Co. vs. Varnville Co., 237 U. S., 597. But the State regulation there involved sought, directly, to deal with actual movements in interstate commerce, and to apply *to such movements*, and the liabilities growing out of the same, and to apply thereto a "State policy differently conceived" from that expressly made applicable to interstate shipments by Congress. Had the regulation applied only to shipments wholly within one State, can it be contended that it would have been invalid, even though it might have had some incidental effect upon interstate commerce, in the absence of a finding by the Interstate Commerce Commis-

sion that the relation of the State and interstate regulations produced an unjust discrimination against interstate commerce? The question, we think, is answered in the negative by this court in the Minnesota Rate Cases, 230 U. S., and in C., M. & St. Paul Ry. vs. Public Utilities Commission of Illinois, 242 U. S., 333. Besides, in the Varnville case the court had before it a situation where there had been "specific action" by Congress upon the particular subject matter of the State regulation; such is not the case here, as has already been shown. These remarks with respect to the Varnville case are applicable to the other cases cited by counsel for plaintiff in error on pages 10 to 21 of their brief; in each of them an actual interstate transaction was attempted to be directly regulated by the State, and in each instance Congress had covered the exact field by "specific action."

3. *General discussion of authorities.*

C., B. & Q. Ry. Co. vs. Wisconsin R. R. Comm., 237 *U. S.*, 220: The regulation involved in this case was required by a State statute, the Commission having no discretion in the matter,—having no power to consider the question whether, as a matter of fact, the facilities already furnished were adequate. The statute, made an arbitray test to the effect that any village having as much as 200 population, and having a postoffice, was entitled to have at least two trains each way stop there if as many as four were run, regardless of the volume of business and all other conditions. The Commission, as was shown in its order, thought that the "other facilities" were, as a matter of fact, adequate, but, holding that it had no discretion in the matter, ordered the stoppage of the trains in question. The State courts held that the Commission had no discretion in the matter. But under the Texas statute, involved in the present case, the Commission exercised discretion, and upon a consideration of the evidence before decided that the "other facilities" at Meridian were not adequate, and because of the inadequacy as a matter of fact, made the order involved. Here the test of adequacy was not an arbitrary one,

but involved a consideration of all relevant facts and conditions.

The Wisconsin Supreme Court, in the case cited, held that the requirement of the statute necessarily applied to interstate trains regardless of the question of adequacy, as a fact, of the other facilities; the Texas statute, and the order involved, do not necessarily apply to interstate trains, in the event other adequate facilities are furnished.

The Wisconsin Supreme Court held that the regulation "seriously interfered with the through traffic"; the Texas order according to the findings and conclusions of the State courts does not seriously, or at all, interfere with the through or interstate traffic; the only possible interference, under the uncontradicted evidence, will be a maximum delay of three minutes for one train and ten minutes for the other,—the uncontradicted testimony showing that this time can easily be made in the operation of the trains over the hundred-mile run from Temple to Cleburne. Besides the company may easily make up the delay necessary but saving stops and delays voluntarily made at numerous other places. There is no requirement that these trains be stopped at Clifton, the first station north of Meridian, and a smaller station, or at Morgan, the first station south of Meridian, and a smaller station, or at any of the numerous small stations where they are voluntarily stopped in Oklahoma and Texas.

The facts showing the adequacy the "other facilities" at Cochrane, Wisconsin, were very much stronger than the facts offered here to show the adequacy thereof at Meridian. Cochrane had 260 inhabitants; Meridian had 1500 or more. Cochrane was not a county seat; Meridian is a county seat. Cochrane was furnished with Pullman and sleeping car service; Meridian has none. The Texas State law, as construed by the State courts, under the facts of this case, requires adequate sleeping car service at Meridian; this was voluntarily furnished at Cochrane.

The entire traffic on the trains involved in the case cited was 90 per cent interstate; the proportion between State and interstate traffic on the trains here involved was left undisclosed by

plaintiff in error, but the testimony of its witness Hull indicates that a large proportion of the traffic is intrastate.

The distinction between the case cited and the one at bar is clearly and correctly drawn by this court on page 233 of the report of the Wisconsin case, and the Wisconsin case, we submit, is ample authority for the upholding of the decision of the Texas courts in this case.

I. C. Ry. Co. vs. Illinois, 163 *U. S.*, 142:

This case is, in effect, declared to be inapplicable here by the Supreme Court in that portion of the opinion wherein it is said:

"The question whether a statute which merely required interstate railroad trains, *without going out of their course*, to stop at county seats, would be within the constitutional power of the State, *is not presented*, and *cannot* be decided upon this record."

Meridian, the point where the Santa Fe trains were ordered to be stopped, is a county seat and is upon the main line of road traversed by the trains, and, in going through the exact point where they are ordered to be stopped, they cannot go "out of their course." So, manifestly, even if it were granted that the trains were "interstate *railroad* trains," which is "not admitted, but expressly denied," that case in no way supports appellant's contention.

C., C., C. & St. L. Ry. Co. vs. Illinois, 177 *U. S.*, 514:

Under the regulation, whose validity was successfully challenged in this case, the State of Illinois attempted to compel the stoppage of the Knickerbocker special at *all* county seats on the line in the State. This train was described in the pleading of the railroad company as follows:

"The Knickerbocker special is not a *regular passenger train* for carrying passengers from one point to another in the State of Illinois, such traffic being *amply* provided for by other trains, and the Knickerbocker special is used *exclusively* for *interstate* traffic from and to points without the State of Illinois." (P. 516.)

Santa Fe trains Nos. 17 and 18, on the other hand, are *reg-*

ular passenger trains for the carriage of passengers from one point to another within the State of Texas, and they are *not used exclusively* for interstate traffic. (See Hull's testimony, S. F., pp. 21, 22-23.) Again, in this case, whether intrastate traffic was "amply provided for by other trains" was a contested question of fact, which question was resolved against the company by the trial court, while in the case cited above, and by appellant, this proposition was *admitted* by the State, for the case was decided on demurrer. Says the court:

"The demurrer to the answer admits that the railway company furnishes a *sufficient* number of regular passenger trains (four each way a day) to *accommodate* all the local and through business along the line of the road, and that all of such trains stop at Hillsboro; that none of such trains have been taken off, and all of which ran prior to the putting on of the Knickerbocker special still run and stil stop at Hillsboro, and that they *furnish ample and sufficient* accommodations to *all* persons desiring to travel to and from that place; that the Knickerbocker special was put on is response to an urgent demand on the part of the through traveling public from St. Louis to New York and that it was *necessary*, as the passenger trains theretofore used *could not*, by reason of stopping at way stations, *make the time required for eastern connections*, and if compelled to stop at county seats the company will be *compelled to abandon the train* to the great damage of the traveling public and to the railway company." (P. 521.)

As stated, the "adequacy" of the "other facilities" was admitted by the State there; here it is not only *not* admitted, but it is very vigorously contested, and the trial court, upon the evidence, has resolved the issue against the company; there it was *admitted* that the train was used *exclusively* for interstate traffic; here there is not only no such admission, but the uncontradicted evidence shows the contrary; there it was *admitted* it was *necessary* for the making of *eastern connections* that the train be not stopped, and that if it were required to be stopped at county seats the company would be *"compelled to abandon"* the train *"to the great damage* of the traveling public"; but here there is not even an *allegation* that

any such results will follow from the stopping of trains Nos. 17 and 18 at Meridian, and all of the evidence goes to prove the contrary. The inapplicability of that case to the record here, as an authority against the validity of the regulation, is manifest at the merest glance. Not only is this true, but it is true, also, that the case, when considered with reference to the real facts of each of the cases here and there, is authority for sustaining the Texas regulation.

The Texas statute, and the order of the Railroad Commission, can be sustained under the case. In that case, the Supreme Court distinguishes the case from that of Lake Shore & Michigan Southern Ry. Co. vs. Ohio, 173 U. S., 285, infra, and in doing so, also, drew a distinction between the Illinois statute and the Texas statute. On page 520 of the report, the court says, in referring to the L. S. & M. S. Ry. Co. vs. Ohio, supra:

"This case is readily distinguishable from the one under consideration in the fact that the statute of Ohio required *only* that three regular passenger trains should stop at every station containing three thousand inhabitants, leaving the company *at liberty to run as many through passenger trains exceeding three per day as it chose*, without restriction as to stoppage at particular stations. In other words, it left open the loophole which the statute of Illinois effectually closed."

The order now in question only requires that two particular trains be stopped at Meridian; there is nothing to prevent the company from running as many "through passenger trains" as it chooses, unless the Railroad Commission shall decide to order the stoppage of the other through trains. It cannot be presumed that the Commission will exercise this discretion if the company *shall choose to run* other through trains; it has not done so, and certainly the particular order whose validity is here sought to be impeached can in no way affect such other trains. If the company shall hereafter put on other through trains, and the Commission shall then order their stoppage, that is a question for the future and in no way involved here. The Texas statute, and the

action of the Commission thereunder, as did the Ohio statute, "left open the loophole which the statute of Illinois effectually closed." Besides, as shown before, the facts upon which that case was decided, in every material respect, were the *reverse* of the facts here. That opinion when read alone, or when read in the light of prior and subsequent decisions, means that if the "other facilities" had not been adequate, or if the regulation had not amounted to a serious interference with interstate commerce, which was *admitted* in the Illinois case, the regulation would have been sustained.

Mississippi R. R. Com. vs. I. C. Ry., 203 *U. S.*, 335:

There are numerous material points where the facts, etc., in the case cited *differ* from the facts, etc., here. In the first place, the statute under which the Mississippi Commission was acting, and the effect of the action thereunder, required every railroad to "cause each and *all* of its passenger trains to stop for passengers at all county seats at which it has a depot," while the statute under which the Texas Commission was acting provides that "four trains each way, carrying passengers for hire, if so many are run daily, Sundays excepted, be required to stop, as aforesaid, at all county seat stations." (R. S., 1911, Art. 6676.) In the next place, the railroad company, in that case, "showed that it was operating an interstate line of railroad" under due *authority* of the State and the nation, which *interstate* road had been established by Congress "and operated by complainant as a *national highway*, for the accommodation of interstate commerce and the carriage of the *mails* of the United States, and had been so recognized and promoted as such by various acts of Congress; and owing to the exigencies of its interstate business and the requirements of modern commerce and passenger transportation, as well as the transportation of freight and the United States mails, the complainant has been, from time to time, required to shorten its schedule and to maintain and operate certain fast through trains intended primarily and chiefly for interstate transportation and interstate

commerce * * * that the two trains (there in question) * * * were run expressly for the purpose of carrying the interstate business and for the transportation of the United States mail, *and that they were run on special schedules for that purpose,* and of necessity had to make close connections with other through trunk lines of railroad doing an interstate business, and in order to maintain the necessary schedule of time for the operation of these interstate trains it was impossible and wholly impracticable to stop at all stations * * * that a compliance with the order of the Commission, by stopping the trains named, would *imperil* the ability of the complainant to comply with its contract with the United States for the carriage of the mails, and would embarrass its interstate traffic, and that it would be *impossible,* under the present condition of the roadbed and equipment of the complainant, to *increase* the speed of the trains so as to allow for the stoppage of the trains as directed by the Commission."

In the third place, it was neither alleged nor proved in the instant case the trains were either inaugurated or operated "expressly for the purpose of carrying the interstate business and for the transportation of the United States mail, and that they were run on special schedules for that purpose," or that "it would be impossible, under the present condition of the roadbed and equipment of the complainant, to increase the speed of the trains so as to allow for the stoppage of the trains as directed by the Commission," or that the stoppage of the trains would "imperil the ability" of the company "to comply with its contract with the United States for the carriage of the mails," all of which was both alleged and proved in the case cited. These were matters of great importance in influencing the decision in that case, as is shown by the language of the opinion; for instance, says the court:

"The railroad has been *recognized by Congress,* and it is the recipient of large land grants, and the carrying of the mails is a most important function of *such* a road. The fact that the company has contracts to transport the mails of the United States *within a time which requires great speed of the trains carrying*

them (note: it was alleged and proved there that *speed* was of the essence of the contract, but not so in this case), *while not conclusive,* may still be considered upon the general question of the propriety of stopping such trains at certain stations within the boundaries of a State."

There is here no proof whatever that the *speed* of the trains cannot be increased so as to make up the five or ten minutes to be consumed in the stoppage of the trains at Meridian, but, on the contrary, the great preponderance of the evidence goes to show that such could be done. Mr. Hull, witness for plaintiff in error, testified that the time could be made up. Besides it is shown that the trains are actually stopped by the company *voluntarily* at every other county seat station in Texas, and that it is scheduled to stop *at every station within the State of Oklahoma,* some of which stations are shown to contain not more than 100 inhabitants!

And, again, the decision in that case was finally predicated upon the proposition that the company had furnished other train facilities, greater than those at Meridian, which were themselves *adequate.* The inadequacy of the "other facilities" furnished by plaintiff in error have been dealt with elsewhere. The point we are making here is that the case cited by plaintiff in error, because of differences in facts and conditions, is *not authority* for the contention of appellant.

Atlantic Coast Line vs. Wharton, 207 *U. S.,* 328:

The validity of the regulation involved in Atlantic Coast Line vs. Wharton was *tested* by the Supreme Court:

"By the local facilities at the station at which the trains were ordered to stop."

In that case, as in the one last cited, it was admitted that the railroad and the trains were *interstate.* The place at which those trains were ordered to be stopped was a small station of about 453 inhabitants; Meridian is a town of 1500 inhabitants. The company had a through interstate train each way which stopped at

Latta and which were equipped "with first and second class cars, *through Pullman sleepers,* mail, express and baggage cars"; a passenger cannot get *Pullman* service either into or out of Meridian or any other trains than those ordered to be stopped there; the only objection to the other trains of the Coast Line "was their want of speed"; but there are *numerous* objections to the other trains of the Santa Fe; they are slow of schedule; some of them only run 100 miles in all; none of them carry *sleepers,* and their other equipment is not of the high class of that carried on trains Nos. 17 and 18, and the schedules are not as convenient as that of Nos. 17 and 18. The Coast Line had *eleven* other trains, which stopped at Latta, some of which were *through* trains between New York and Tampa; the Santa Fe, for part of the time, only had *four* trains, and at no time had more than *six,* two of which only ran between Temple and Cleburne, a distance of 100 miles. The evidence shows the amount of travel out of and into Meridian to be much greater than at Latta. We submit, therefore, that a finding that the "other facilities" furnished at Latta were "adequate," in no sense can be a precedent for a finding that the facilities at Meridian are "adequate." The opinion in the Atlantic Coast Line case amounts to nothing more than a finding of fact upon this question, "adequacy."

Herndon vs. C., R. I. & P. Ry. Co., 218 *U. S.,* 135:

The effect of the regulation in question in Herndon vs., C., R. I. & P. Ry. Co., 218 U. S., 135, was to require the stoppage at a point of junction of another road of *all* passenger trains, interstate or not, that carried passengers destined to points on the line of the connecting carrier. This case was also decided upon the finding of fact that the "other facilities" furnished the public *at the junction point* by both companies were adequate. The other trains furnished by the complaining railroad company at Lathrop amount to *six,* three each way; the other company had *four* trains that stopped at the station and which made close connection with complainant's trains which stop there, and it was very infrequently

passengers were interchanged between the two roads. The case was decided on demurrer: "The averment of the bill is that the business is *already amply provided for* in the other trains of the company and the connecting road, and the serious detriment to the interstate carrying business from the requirement to stop the through trains described for the purpose of permitting such transfers, is fully set forth in the bill, *and admitted by the demurrer.*" The question of adequacy was admitted in that case; there was no contest whatever over what the facts might be, and it was upon this *uncontested* state of facts that that case was decided; but here we not only have a direct finding by the trial court that the "other facilities" furnished by the Santa Fe at Meridian are "inadequate," but this finding is supported by the great preponderance of the evidence. The case cited by plaintiff in error clearly, then, cannot aid it in the maintenance of its position, and this court surely cannot regard that case as authority for holding the Railroad Commission's order and the statute invalid here where the question of adequacy itself must be determined.

We understand that the burden is upon him who impeaches the validity of a statute or order of the Commission to show clearly that the same is invalid by facts and authority in order to prevail in his contention. No authority has been yet produced by plaintiff in error to do this here, and for this reason alone, it seems to us, the judgment of the trial court should stand. But we shall not content ourselves, as we might very well do, with showing the inapplicability of cited authority, since there are cases decided by the court of last resort in matters of this kind that are in point to sustain the judgment.

Lake Shore & Michigan Southern Ry. Co. vs. Ohio, 173 *U. S.*, 285:

This case very amply sustains the validity of the regulation enforced by the judgment now under review.

By an act of the Legislature of the State of Ohio it was provided:

"Each company shall cause three, each way, of its regular trains

carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village, containing over three thousand inhabitants, for a time sufficient to receive and let off passengers," and provided penalties for violations of such provisions.

The Lake Shore & Michigan Southern Railway Company is a corporation organized under the laws of the States of Ohio, New York, Pennsylvania, Indiana, Michigan and Illinois. Its road extends from Chicago, through the States named, to Buffalo, New York, and runs through the village of West Cleveland, which has a population of 3000 or more. The company operated through the village three or more regular passenger trains, each way. It did not stop more than one of the trains. On the day in question, says the court, "the company was engaged in carrying both freight and passengers over its railroad from Chicago and other stations in Indiana and Michigan through each of said several States to and into New York, Pennsylvania and Ohio to Buffalo, and from Buffalo through said States to Chicago. It did not on said date nor shortly prior thereto * * * run daily both ways or either way over said road through the village of West Cleveland, three regular trains nor more than one regular train each way carrying passengers 'which were *not* engaged in interstate commerce, or that did not have upon them passengers who had paid through fare and were entitled to ride in said trains going in one direction from the city of Chicago to the city of Buffalo * * * and those going in the other direction from the city of Buffalo * * * to the city of Chicago." The train which was stopped at the village did not carry interstate passengers. "The average time required to stop a train of cars and receive and let off passengers is three minutes." "The number of villages in Ohio containing three thousand inhabitants through which the trains passed on the day named was thirteen."

In an action brought by the State the railway company was fined for refusing to stop its passenger trains at West Cleveland in accordance with the provisions of the statute above cited. A recovery having been had the railroad company took the case to

the Supreme Court of the United States. The court states the question involved in the case as follows:

"The plaintiff in error contends that as the power to regulate interstate commerce is vested in Congress the statute of Ohio in its application to trains engaged in such commerce is directly repugnant to the Constitution of the United States."

In upholding the validity of the statute the court said:

"It is not contended that the statute in question is repugnant to the Constitution of the United States when applied to railroad trains carrying passengers between points within the State of Ohio. But the contention is that to require railroad companies, even those organized under the laws of Ohio, to stop their trains or any of them carrying interstate passengers at a particular place or places in the State for a reasonable time, so directly affects commerce among the States as to bring the statute, whether Congress has acted or not on the same subject, into conflict with the grant in the Constitution of power to regulate such commerce. That such a regulation may be in itself reasonable and may promote the public convenience or subserve the general welfare is, according to the argument made before us, of no consequence whatever; for, it is said, a State regulation which to any extent or for a limited time only interrupts the absolute, continuous freedom of interstate commerce is forbidden by the Constitution, although Congress has not legislated upon the particular subject covered by the State enactment. If these broad propositions are approved, it will be difficult to sustain the numerous judgments of this court upholding local regulations which in some degree or only incidentally affected commerce among the States, but which were adjudged not to be in themselves regulations of interstate commerce, but within the police powers of the State and to be respected so long as Congress did not itself cover the subject by legislation. Cooley vs. Philadelphia, 12 How., 299, 320; Sherlock vs. Alling, 93 U. S., 99, 104; Morgan vs. Louisiana, 118 U. S., 455, 463; Smith vs. Alabama, 124 U. S., 465; Nashville, Chattanooga, etc., Railway vs. Alabama, 128 U. S., 96, 100; Hennington vs. Georgia, above cited; Missouri, Kansas & Texas Railway vs. Haber, above cited, and N. Y., H., H. & Hartford Railroad vs. New York, 165 U. S., 628, 631, 632, were all cases involving State regulations more or less affecting interstate or for-

eign commerce, but which were sustained upon the ground that they were not directed against nor were direct burdens upon interstate or foreign commerce; and having been enacted only to protect the public safety, the public health or the public morals, and having a real, substantial relation to the public ends intended to be accomplished thereby, were not to be deemed absolutely forbidden because of the mere grant of power to Congress to regulate interstate and foreign commerce, but to be regarded as only incidentally affecting such commerce and valid until superseded by legislation of Congress on the same subject." * * * "Consistently with these doctrines it cannot be adjudged that the Ohio statute is unconstitutional. The power of the State by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals or the public safety." * * * "In our judgment the assumption that the statute of Ohio was not directed against interstate commerce but is a reasonable provision for the public convenience, is not unwarranted. The requirement that a railroad company whose road is operated within the State shall cause three each way of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at any station, city or village of three thousand inhabitants for a time sufficient to receive and let off passengers, so far from being unreasonable, will greatly subserve the public convenience." * * * "It was for the State to take into consideration all the circumstances affecting passenger travel within its limits, and as far as practicable make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide for the convenience of persons desiring to travel from one point to another in the State on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the State to places beyond its limits, or the convenience of those outside of the State who wished to come into it. Its statute is in aid of interstate commerce of that character."

The order of the Railroad Commission is not a general order commanding appellant to stop these trains at a number of places, or any place coming within a particular classification, but the order is limited entirely to their stoppage at the *one* place. Neither

can it be argued that the sustaining of this order will lay the predicate for other orders for other places, because the evidence shows that Meridian is the *only* county seat town on the line of appellant in Texas where the trains are not voluntarily stopped. It follows, therefore, that the maximum delay that can be caused the trains by the enforcement of the order is five minutes. It is not shown that it would *cost* appellant anything at all, except the five minutes' time, to comply. Can it, in all conscience, therefore, be said that the delay to the train is *unreasonable?* And can the plaintiff in error, with any sort of countenance, contend that this particular delay will interfere with its interstate traffic, when it is shown without conflict that it voluntarily stops both of the trains at "every village, hamlet and town," as soon as they cross over into Oklahoma; that they are stopped at other stations in Texas, on the ground of revenue, which are not county seat towns and which are smaller in population than Meridian; and that, on numerous occasions it has voluntarily stopped these very trains at Meridian, and that for a period of time one of them was advertised to stop at Meridian; and, furthermore, that it is possible in the operation of the trains for the distance of 100 miles between Cleburne and Temple five to ten minutes' time can be "made up" to offset the delay at Meridian? Is there anything in morals, fact or law to justify the position assumed by plaintiff in error when the claim is made that the five minutes' delay will ruin the interstate traffic, when appellant voluntarily, and without injury, delays a material part of the equipment and a considerable proportion of the traffic at Fort Worth, each way, for three and a half hours?

And are the needs of those humble citizens of Meridian who desire to make interstate trips, and return home, to be entirely ignored, in order that plaintiff in error may furnish accommodations to villages in Oklahoma of a hundred population? The Supreme Court has said, supra, that the stoppage of the trains at Meridian, so far as the aforesaid humble citizens are concerned, works an aid to interstate commerce, and we believe it will not

fail to adhere to that doctrine, and while adhering, go farther to say that if the trains can be stopped at Thackerville and Wayne, etc., over the river in another State, without incurring to plaintiff in error swift destruction of its interstate business, it can be stopped at a county seat town in Texas of 1500 population without destruction or unreasonable hindrance.

This court, also, has placed the power of the State to provide for the *convenience* of its citizens upon the same ground, and with the same broad limits as the power to provide for the safety, morals and health. A measure that is reasonably calculated to serve the convenience of the citizenry of Meridian, and of those who would come there, and which cannot possibly delay the trains of appellant more than five minutes, certainly is not an unreasonable interference with interstate commerce. A measure of this sort, to be void upon this ground, must *unreasonably* burden interstate commerce. That this measure will serve the convenience of the people cannot be denied; what man will say that, under the circumstances, it is *unreasonable?* Before it can be held to be so, the courts must say that the Railroad Commission, a branch of the government, was not sincere in basing the order upon the ground that it would serve the convenience of the public, but that it was, in a disguised way, directed against interstate commerce. The correct view of the regulation, under the facts, we believe, and submit, is that it is a reasonable measure to promote the convenience and welfare of our citizenship, and that its effect, if any, upon interstate commerce is that indirect and incidental effect that flows from every regulation calculated to work for the safety, health, morals, or convenience of the people, and under such view no authority can be found for its condemnation.

4. *The Texas statute, providing a penalty for failure and refusal to obey the order of the Texas Commission, does not operate to deny the right to a judicial hearing and determination without the risk and fear of penalties being imposed as a punishment for contesting the validity of the order, but the statute provides for due process in every particular.*

In the discussion of this question found on pages 35 et seq. of the brief for plaintiff in error the impression is sought to be left that an order of the Railroad Commission of Texas may not be suspended by the courts at the instance of the railway company pending the final determination of its validity. On pages 37 and 38 of the brief counsel for plaintiff in error set forth Article 6657, R. S., 1911, which provides for a direct attack upon any order of the Commission; but on page 38 they say:

"But no authority is conferred to stay the operation of the order in or pending such proceeding."

As has already been stated, this statement furnishes a source of wonder since some of the counsel who signed the brief have filed numerous suits under Article 6657 attacking various orders of the Commission, wherein temporary injunctions have been granted suspending the operation of the orders, and in some instances such suits have been filed, and temporary injunctions issued, before the effective dates of the orders; some proceedings, thus filed by counsel, wherein temporary injunctions have thus been granted are now pending in the State courts, and at least one case is pending in the Federal courts wherein counsel secured restraining orders, without notice, suspending a large group of rate orders. (See Eastern Texas R. R. Co. vs. R. R. Comm. of Texas, 242 Fed., —.)

That Article 6657 provides for a direct proceeding in the Federal court,—as well as in the State court,—to test the validity of the orders of the Commission is held by this court in Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362, 391-392.

The order involved here was entered on March 11, 1912, and was to become effective April 2, 1912 (Pr. Tr., p 3); this suit was not filed until May 1, 1912. (Pr. Tr., p. 2.) On March 11th, or on any other day thereafter, in term time or vacation, the plaintiff in error, pursuant to Article 6657, could have filed suit in the State court or in the Federal court to test the validity of the order, and either of said courts could have, with or without notice, instantly suspended the operation of the order pending

final determination. We have stated that some of the counsel who signed the brief for plaintiff in error have on numerous occasions, in behalf of plaintiff in error, thus attacked other orders of the Railroad Commission. That this may be done, and that the effect of the order may be instantly suspended, even before its effective date, under the construction of the statute given it by the State courts, is shown by the case of G., H. & S. A. Ry. Co. vs. Railroad Commission, 112 S. W. Rep., 345, 346. In that case an order was entered on July 20, 1907, effective August 1, commanding the railway company to re-establish a certain train; immediately upon the entry of the order, the railway company filed a suit in the State court to test the validity of the order, and on July 23, 1907, the order was suspended by the court and a temporary injunction was issued; from this interlocutory order an appeal was taken by the Railroad Commission and the entire matter was decided thereon. Furthermore, after this suit was filed by the State, the plaintiff in error could have immediately filed a cross-bill, under the Texas practice, attacking the validity of the order (State vs. St. L. S. W. Ry. Co., 165 S. W., 491, 496), and thereupon could have applied for a stay of the order and a temporary injunction, and, if the same had not been granted, it could have appealed from the refusal to grant the temporary relief and have had its right thereto decided by the appellate courts. (See Article 4644, R. S., 1911, which provides for an expedited appeal from all orders, entered in term time or vacation, granting, refusing or dissolving injunctions.) During the pendency of the temporary injunction no penalties could have been incurred.

Every condition which made the Georgia statute valid as held in Wadley Southern Ry. Co. vs. Georgia, 235 U. S., 651, 666-669, exists with respect to the Texas statute, and the order here involved, and, in addition, under the Texas statute the railway company could have, by cross-action,—under the blended law and equity practice of the State,—in this very case, and on the very day the suit was filed, procured a temporary stay of the order and an injunction against its enforcement, or, failing to secure such

relief, it could have appealed from the refusal to grant the interlocutory relief, and in the proceeding for such immediate relief all questions of law and fact touching the validity of the order could have been litigated.

To illustrate the effectiveness of the remedy available to plaintiff in error to test the validity of the order preliminarily, it may be stated that in no case where a railway company has applied for a temporary stay and injunction, in the State courts, under Article 6657, to test the validity of an order, has such temporary relief been denied by the State courts. Counsel for plaintiff in error cannot point to a single case where the relief has been denied.

Article 6676, R. S., 1911 (copied on page 2 of the brief for plaintiff in error) is not self-executing; it is a part of the Railroad Commission law of the State, and under the construction given it an order of the Commission is necessary to bring the statute into operation. Such is certainly the construction given the statute in this case. This suit was not brought to enforce the statute, or to recover penalties for its violation, but the suit was brought to enforce the order made under the authority of the statute and for penalties for violations of the *order*. Before the Commission can make an order of this, or any other kind, ten days notice must be given the carrier interested, a public hearing must be held, and when an order is made a copy thereof must immediately be served upon the interested parties. In this case the notice was given and at the hearing the "petitioners and the Gulf, Colorado & Santa Fe Railway Company appeared in pursuance of previous notice duly given by the Commission" and all evidence offered by all parties was heard and considered by the Commission (Pr. Tr., p. 3), this hearing being held on the 13th day of February, 1912; the order was thereupon entered on March 11, 1912, and a copy thereof was immediately served upon the plaintiff in error. (Pr. Tr., p. 4.)

In addition to the other remedies available to the plaintiff in error, discussed above, it could, at any time, and can yet, file an application for a rehearing, or an application to have the order

suspended temporarily or permanently, or an application to have the same modified, and such applications would have been, and will be, considered by the Commission, and if the new evidence warranted, the order would have been suspended or modified.

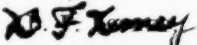
In the concluding paragraph of the opinion in Wadley Southern Ry. vs. Georgia, 235 U. S., 651, 699, this court said:

"But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful."

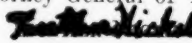
And this, we think, announces the law applicable to this case.

Wherefore, defendant in error prays that the judgment of the district court of Travis county, Texas, and of the Court of Civil Appeals, be in all things affirmed.

Respectfully submitted,



Attorney General of Texas.



Assistant Attorney General of Texas.

Attorneys for Defendant in Error, the State of Texas.

IN THE

Supreme Court of the United States

FRANK R. WILLIAMS, *Complainant,*

vs.

CHARLES POTTER, ET AL., U. S. INSPECTORS OF STEAM VESSELS, *Defendants.*

MOTION ON PETITION AND AFFIDAVIT FORMA PAUPERIS, TO BE RELIEVED OF COSTS,

AND A

MOTION TO ADVANCE.

To the Judges of the Supreme Court of the United States,

Frank R. Williams, citizen of the United States, and of Syracuse, N. Y., petitioner hereof, and appellant in above cause,

RESPECTFULLY SHOWS TO THE COURT.

First. That complainant is acting as his own counsel and behalf in prosecuting this cause himself and for his own behalf, for reasons financial, and otherwise.

Second. That for several years he has been a sailor in the season thereof, having been mainly an engineer officer upon steam vessels, and also deck hand, and wheelsman thereof; and now desires the easier and to him preferable occupation as pilot, and because of his right thereof, and information and capability therefor.

Third. That the cause is not frivolous, but is a good one upon its merits, as petitioner verily believes; that he is entitled to the redress he seeks as a just right, which is one "in which is drawn in question the validity of an authority exercised under the United States," to wit, the right of a license as pilot of steam vessels, now refused by the Inspectors of Steam Vessels, but which petitioner believes is an illegal, arbitrary and false refusal thereof.

Fourth. That petitioner is at present a poor person, having no estate nor financial means, not being worth over $100 above clothing and implements of employment; and has had unprofitable expense for some years, on account of this litigation, and other reasons.

Fifth. Therefore, your petitioner files this, his affidavit, that because thereof, he is unable to pay or to give security for printing, and other costs in said case, and that there is no one interested by contract or otherwise, or entitled in the recovery, who is able to bear the expense.

Wherefore, petitioner prays this Honorable Court, that he be relieved from printing the record in this case, and allowed to furnish typewritten copies one

or more of the formal appeal papers merely, and of his brief, and such other matter as may be; and that he be relieved from printing brief, or other costs, as may be.

Frank R. Williams, being sworn, deposes and says, that he is the petitioner hereunto, and that the statements in the foregoing petition to which this affidavit is annexed, are all and severally true, to the best of his information, knowledge and belief, except as to matters of information and belief, and these he believes to be true.

FRANK R. WILLIAMS,
535 Clinton Street, Syracuse, N. Y.

Subscribed and sworn to before me, this 30th day of March, 1916.

C. GRACE KENTNER,
Notary Public.

(Seal.)

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

IN EQUITY.

FRANK R. WILLIAMS, *Plaintiff in Error,*
vs.
CHARLES POTTER, ET AL., U. S. INSPECTORS OF STEAM VESSELS.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION BY THE COMPLAINANT TO ADVANCE.

Comes now the complainant, Frank R. Williams, *in pro per,* and moves the court to advance the above entitled cause for hearing on a day convenient to the court.

Complainant sued defendants, Inspectors of Steam Vessels, in equity, for a pilot license of steam vessels; which the said inspectors had refused this applicant by arbitrary and false and fraudulent refusals thereof; though well knowing applicant's capability thereof, and though he did upon their required examination therefor, answer the said questions substantially correctly, and otherwise prove his capability, and that he was entitled to such pilot license.

However, said inspectors did each and severally arbitrarily and falsely mark such examination as errors, and in their official refusals falsely allege errors and incapacity thereof, as the proof of the face of said refusals, and the stenographer's transcript, and the United States charts, and other official information show.

That the several two Boards of Local Inspectors, and the Supervising Inspector of that district, did, at the several diverse times, so falsely refuse applicant.

That the said two Boards of Local Inspectors, and said Supervising Inspector, did act uniformly and in concert in so fraudulently refusing applicant, although well knowing him to be capable and proper person for such service; and that he had been licensed engineer of steam vessels and so served at periods for past twenty years, and of deck experience sufficient to demonstrate his present capabilities therefor.

That the immediate cause of said animosity and arbitrary action is the fact that applicant obtained

decree of United States Court, declaring invalid an important rule, viz., 198 Fed. Rep., 460.

That inspectors, by direction of their Bureau, have since maintained in effect said rule, and even increased its illegal restrictions, contrary to statute law, and the rights of citizens, and the welfare of public navigation and commerce.

That the inspectors have promulgated, and annually re-enact and maintain a pretended "Rules and Regulations," allegedly upon R. S. 4405; but which were *not authorized* by said R. S. 4405, in view of the original statute, 10 St. L. c. 106, Sec. 18; and in further view of R. S. 4462, and its original statute, 14 St. L. 227, Secs. 14 and 16 thereof, which latter gives to the "Secretary of the Treasury" (now Secretary of Commerce), the sole power and duty to "* * * make such regulations as may be necessary to secure the proper execution of this title."

But, as the said Secretary has made *no Regulations,* of this effect, *therefore none exist.*

In consequence of foregoing, the "Rules and Regulations of the Inspectors," *are unauthorized, invalid and void.*

A constitutional question is therefore involved, and one which is of immediate public importance; in view of the fraudulent restricting the numbers of licensed pilots and engineers needed for navigation service, and other illegalities by illegal and fraudulent regulations, and practices thereunder.

THEREFORE, in view of the public importance of the plain facts, especially AT SUCH PRESENT TIME OF

NEED, this applicant moves this Court to advance this case, to the earliest moment possible.

Notice of this motion has been served on opposing counsel.

FRANK R. WILLIAMS, *pro per,*
535 Clinton Street, Syracuse, N. Y.

May, 1916.

Office Supreme Court, U. S.
FILED
MAY 5 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 990. 159

FRANK R. WILLIAMS, PLAINTIFF,

vs.

CHARLES POTTER ET AL., UNITED STATES INSPECTORS OF STEAM VESSELS, DEFENDANTS.

SUPPLEMENTAL MEMORANDUM ON MOTION TO ADVANCE, AND FOR ADJUDICATION WITHOUT ORAL ARGUMENT, AT THIS PRESENT TERM OF THIS COURT.

This applicant heard the motion preceding his own ask that "also, that said case be heard at once, this term, upon the papers, without oral argument, because of facts of immediate public importance" (Supplemental Memorandum on Motion to Advance, No. 987) and heard the instruction thereof.

So likewise this applicant submits this his memorandum, praying similarly, believing his cause, though individually brought, is of sufficient public importance to warrant same, because:

1st. As affecting public navigation, by reason of the deficient numbers of licensed steamboat pilots and engineers at the present condition of navigation, especially as late legislation now requires increased numbers, and which necessary numbers of licensed men are not now to be had, for the reason:

2d. That the Inspectors of Steam Vessels arbitrarily, falsely, and fraudulently refuse such licenses to men undoubtedly capable and legally entitled thereto, but which are not of a special class to which said inspectors exclusively grant licenses, while refusing licenses to all other persons whomsoever and acting apparently in the interest of a limited monopoly of the Union of Marine Engineers and Pilots.

3d. That there are other malfeasances, under alleged "Rules and Regulations," which are illegal, as set forth in complaint, by which manifest damage is caused to steamboat persons and others, inspectors claiming arbitrary authority therefor under R. S. 4405, regardless of later and specific statute R. S. 4462, which later was never obeyed.

4th. If license be adjudicated this cause, licenses also will be granted others similarly situated, of which there are large numbers entitled thereto, and relieve other oppressions under illegal rules, which will importantly and immediately relieve and benefit the present critical condition of navigation; not to the extent that some steamers are inoperative, while others are delayed; while some fined, helplessly.

The licensed engineers have demanded double pay, and pilots demand triple pay; while there are not sufficient numbers regardless of pay; while facts are well known to all conversant with navigation.

5th. The decision of the Circuit Court of Appeals, herein appealed from, contain a curious error upon its face, and

its conclusion therefore is erroneous, as pointed out in the assignment of errors, 3 to 8.

6th. This court recently decided a case which seems controling on this in an important respect, that: "Immigrants could not be refused admission into the United States, on account of the anticipated or possible effect on the 'labor market, *viz.*, limited monopoly of pilots.

Also, other decisions sustain applicant's contentions.

Such decisions would seem directive of the justice of the present cause, plainly and abundantly substantiated, and the immediate *public importance thereof.*

Therefore, it is hereby prayed, and moved, that this court render this cause at the earliest possible moment, and by the simplest possible manner; particularly (if possible) in time for relief of this critical condition of navigation of this present summer.

Applicant has speeded this cause to the extent of the attendant and unavoidable circumstances, as will be stated in brief. His repeated application per Department instruction, again refused, April, 1916.

Opposing counsel, the United States attorneys, do not consent to prompt determination, but in the plain, simple facts, and the record, defendants do not need extensive preparation. Notice of this was personally given, and a copy will be served.

Respectfully submitted,

FRANK R. WILLIAMS,
Pro. Per.